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Barbara L. Tang

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THE JAPANESE INTERNMENT AND REPARATIONS: CREATING A JUDICIAL OR STATUTORY CAUSE OF ACTION AGAINST THE FEDERAL GOVERNMENT FOR CONSTITUTIONAL VIOLATIONS

The freedom of which we boast is not lost in shattered Dunkirks and blazing Pearl Harbours, . . . such events call forth the utmost resistance. Freedom is lost little by little in noiseless theft, a fragment of concession to expediency here, a morsel of 'what does it matter?' there. Then, shockingly, we find that freedom has disappeared in the regimentation of not only our daily doings but our eternal ambitions.¹

I. INTRODUCTION

Shortly after the bombing of Pearl Harbor, President Franklin D. Roosevelt ordered the evacuation, relocation and internment of 120,000 people of Japanese ancestry from the west coast.² We remember the tragedy at Pearl Harbor every December 7th, and a memorial honors those killed. Yet our country has not satisfactorily addressed the now recognized unconstitutional internment of those of Japanese ancestry during World War II.³ Approximately two-thirds of those interned were native-born American citizens.⁴

The government's violation of the internees' constitutional rights easily could have been forgotten.⁵ However, discoveries made by Peter

1. A. BOSWORTH, *AMERICA'S CONCENTRATION CAMPS* 244 (1967) (quoting The Royal Bank of Canada Monthly Letter (January, 1966)).

2. Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943). See *infra* note 82 for a discussion of the specific areas the Exclusion Order covered. Any further reference to the "internment" includes the evacuation, relocation and internment of those of Japanese ancestry during World War II.

3. See *infra* note 23 for a list of alleged constitutional violations arising from the internment. See *infra* notes 283-89 and accompanying text for a discussion of the government's effort to compensate the internees for property losses due to the internment. Compare H.R. 442, 100th Cong., 1st Sess. § 2(1) (1987) with S. 1009, 100th Cong., 1st Sess. § 1(a)(6) (1987) (the Senate bill recognizes that basic civil liberties and constitutional rights were violated by the evacuation and internment whereas the House bill only acknowledges "the fundamental injustice" of the evacuation, relocation and internment).

4. 133 CONG. REC. H7561 (daily ed. Sept. 17, 1987) (statement of Rep. Fish).

5. The government originally asserted that its actions were necessary due to the war and were constitutional under its War Powers. *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 92 (1943).

Irons, an attorney and legal historian, reopened the internment issue.⁶ During his research, Professor Irons found documents that disclosed the government's fraudulent concealment of its reason for ordering the internment.⁷ About the same time, Congress appointed the Commission on Wartime Relocation and Internment of Civilians (CWRIC) to "investigate and review the problems resulting from [the] internment program, and then make recommendations to the Congress and the President as to what solutions should be made."⁸ The CWRIC issued its findings in 1982 which, among other things, suggested the government was guilty of concealing its reasons for the internment from the Supreme Court.⁹ This information would have been crucial to the Court when it decided the first curfew/exclusion order violation case.¹⁰

Due to Professor Iron's discoveries and the CWRIC's findings, recent judicial decisions and pending legislation have reopened the internment issue.¹¹ The Supreme Court's decisions in *Hirabayashi v. United States*,¹² *Yasui v. United States*,¹³ and *Korematsu v. United States*,¹⁴ up-

6. Peter Irons' original intent was to focus his research on the legal strategies and tactics involved in the original four constitutional test cases to the internment. P. IRONS, JUSTICE AT WAR vii (1982). These four test cases were: *Ex Parte Endo*, 323 U.S. 273 (1944); *Korematsu*, 323 U.S. 214 (1944); *Yasui v. United States*, 320 U.S. 115 (1943); and *Hirabayashi*, 320 U.S. 81 (1943) [hereinafter the original internment cases]. Through his Freedom of Information Act request, Peter Irons obtained documents from Justice Department files in which:

the government's own lawyers charged their superiors with the "suppression of evidence" and with presenting to the Supreme Court a key military report that contained "lies" and "intentional falsehoods." [His] research also uncovered military files that disclose the alteration and destruction by War Department officials of crucial evidence in these cases. Rather than expose to the Court the contradictions between this evidence and claims made by Justice Department lawyers, military officials literally consigned the offending documents to a bonfire.

P. IRONS, *supra*, vii-ix.

Peter Irons was not only instrumental in uncovering this information, but was also one of the attorneys that represented Fred Korematsu, Gordon Hirabayashi and Minoru Yasui in their petitions for writ of error *coram nobis*. See notes 148-68 and accompanying text for a discussion of these petitions and their significance.

7. See P. IRONS, *supra* note 6, for an in-depth analysis of the government's concealment of its reason for ordering the internment. See also *infra* notes 151-62 and accompanying text.

8. *Hearings on H.R. 5499 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary House of Representatives*, 96th Cong., 2d Sess. 1 (1980) [hereinafter *Hearings on H.R. 5499*].

9. *Hohri v. United States*, 782 F.2d 227, 252 (D.C. Cir.), *reh'g en banc denied per curiam*, 793 F.2d 304 (D.C. Cir. 1986), *vacated and remanded*, 107 S. Ct. 2246 (1987) (with instructions to transfer case to the Federal Circuit).

10. *Hirabayashi v. United States*, 627 F. Supp. 1445, 1456 (W.D. Wash. 1986), *aff'd in part and rev'd in part*, 828 F.2d 591 (9th Cir. 1987).

11. See *infra* notes 290-323 and accompanying text for a discussion of pending legislation.

12. 320 U.S. 81.

13. 320 U.S. 115.

14. 323 U.S. 214.

holding the criminal convictions of Japanese American citizens for violations of curfew and exclusion orders during World War II, have been challenged and overturned.¹⁵ Legislation has also been proposed to make reparations to those interned during World War II.¹⁶

One of the most recent challenges to the internment was brought in the federal class action suit of *Hohri v. United States*.¹⁷ In *Hohri*, plaintiffs sued to recover damages from the United States for the wartime internment of Japanese citizens and residents of Japanese ancestry.¹⁸ The District of Columbia Circuit Court of Appeals held that plaintiffs could pursue their takings clause claim against the federal government, that the Tucker Act¹⁹ waived the government's sovereign immunity under the takings clause and that the statute of limitations on this claim was tolled until 1980.²⁰ The *Hohri* decision raises a number of issues. One principal issue is whether the statute of limitations on the takings claim was tolled since, according to the court of appeals, nothing but an authoritative statement from one of the political branches could have rebutted the presumption given to the military's judgment that the internment was necessary.²¹

An even more important issue, however, is one that the *Hohri* court failed to address in-depth, namely that plaintiffs' non-takings constitutional claims are barred by sovereign immunity.²² The resulting problem is that the United States can deprive citizens of their constitutional rights and yet be immune from suit for its actions. This Comment will first address the need to create a cause of action against the federal government for constitutional violations²³ of the internees' rights.²⁴ A discus-

15. *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985); *Hirabayashi*, 627 F. Supp. 1445; *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

16. See *infra* text accompanying notes 290-323.

17. 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part and rev'd in part*, 782 F.2d 227 (D.C. Cir. 1986), *reh'g en banc denied per curiam*, 793 F.2d 304 (D.C. Cir. 1986), *vacated and remanded*, 107 S. Ct. 2246 (1987) (with instructions to transfer case to the Federal Circuit). For an in-depth discussion of the *Hohri* case, see *infra* text accompanying notes 169-209.

18. 782 F.2d at 231.

19. The Tucker Act waives sovereign immunity for claims founded on statutes, regulations, contracts or the Constitution which create substantive rights to money damages. *Id.* at 242 (citing *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983)).

Reliance on the Tucker Act for takings claims is no longer necessary. The Supreme Court recently decided *First English Evangelical Lutheran Church v. Los Angeles*, 107 S. Ct. 2378 (1987). In *First English*, the Court held that the takings clause is a constitutional provision that is self-executing, and therefore, statutory recognition was not necessary to bring an action for just compensation under the fifth amendment. *Id.* at 2386.

20. 782 F.2d at 253, 256.

21. *Id.* at 252. See *infra* notes 177-188 and accompanying text.

22. *Id.* at 244.

23. For example, a cause of action could be implied against the government for its viola-

sion of past and present reparations legislation intended to redress the internment will follow.²⁵ This Comment will then discuss the problems with pending legislation and will propose revisions.²⁶ Finally, this Comment proposes that Congress enact legislation to prevent future violations, under circumstances similar to the internment, where it is later found that national security did not justify the government's violation of constitutional rights.²⁷ This legislation would allow the federal government to invoke only qualified immunity for constitutional violations.²⁸

II. HISTORICAL BACKGROUND

A. *Prejudices that Fostered the Exclusion*

To help understand why a racially discriminatory action such as the internment occurred, a historical review of the west coast's treatment of the Japanese is necessary. The actions taken against those of Japanese ancestry during World War II were not simply the result of fear of espionage and sabotage, but were primarily the result of greed and prejudice.

West coast anti-Japanese sentiment began as early as 1890.²⁹ The first Japanese immigrants came to the United States as cheap agricultural and railroad labor.³⁰ They replaced the Chinese who were excluded from immigration by the Chinese Exclusion Act of 1882.³¹ The Japanese, unfortunately, inherited the existing hatred directed against the Chinese.³² In fact, at first, the white majority did not distinguish these two ethnic groups from one another.³³ Like their Chinese predecessors, the Japanese

tion of the fifth amendment's due process, equal protection and privileges and immunities clauses; the fourth amendment's search and seizure clause; the eighth amendment's cruel and unusual punishment clause; the sixth amendment's rights to fair trial and counsel; the first amendment's press, speech, religion, petition and assembly clauses; article I, section 9's prohibition of bills of attainder, ex post facto laws and the right to the writ of habeas corpus; and the thirteenth amendment's protection from involuntary servitude. These were the constitutional violations plaintiffs alleged in *Hohri v. United States*, 782 F.2d at 244, for which the United States had not statutorily waived its sovereign immunity.

24. See *infra* notes 214-82 and accompanying text.

25. See *infra* notes 283-99 and accompanying text.

26. See *infra* notes 300-23 and accompanying text.

27. See *infra* notes 324-47 and accompanying text.

28. Reference to "internment-type cases" includes instances where, similar to the internment, it is later found that the government's violation of constitutional rights was not justified under the guise of national security.

29. J. TENBROEK, E. BARNHART & F. MATSON, *PREJUDICE, WAR AND THE CONSTITUTION* 22 (1970) [hereinafter TENBROEK].

30. REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* 30 (1982) [hereinafter PERSONAL JUSTICE DENIED].

31. *Id.*

32. TENBROEK, *supra* note 29, at 23.

33. *Id.*

were viewed as immoral, "‘tricky, unreliable and dishonest.’"³⁴ In the early 1900's, Hollywood fueled these Japanese stereotypes by depicting Orientals as sinister and evil.³⁵

Besides the stereotypes that existed, the public feared that Japan would invade the United States. Japan's victories over Russia in 1904 and 1905 increased this fear.³⁶ The west coast Japanese were considered spies, even prior to World War II.³⁷ Thus, as Japanese immigration rapidly increased, racists claimed that the Japanese would inundate and dominate the west coast.³⁸ Newspapers added to racial hysteria by featuring headlines such as "Japanese a Menace to American Women" and "The Yellow Peril—How Japanese Crowd Out the White Race."³⁹ Politicians fed upon this racial hysteria⁴⁰ and successfully used anti-Japanese campaigns to win elections.⁴¹

Jealousy and greed only worsened prejudices against the Japanese. The majority of Japanese immigrants were farmers.⁴² Upon initially coming to America, they worked as cheap farm laborers. Being both ambitious and hardworking, they soon leased land and successfully farmed for themselves.⁴³ Small non-Japanese farmers came to fear the competition, and large non-Japanese farmers resented losing their primary labor force.⁴⁴ As a result, the agricultural community became a major force in anti-Japanese sentiment and legislation.⁴⁵

Additionally, Japanese immigrants entered the job market and worked as laborers for "railroads, lumber companies, canneries or mines."⁴⁶ They were often willing to work harder and for less money

34. *Id.* at 24 (footnote and citation omitted).

35. *Id.* at 29-32.

36. *Id.* at 25-26.

37. *Id.* at 26. An example of the rhetoric claiming that the Japanese were spies is seen in the following excerpt:

"A characteristic among Japanese . . . is their propensity for spying. . . . Put a huge roof over the Japanese Empire, and you have a national Japanese detective agency, with which there is nothing to compare in the rest of the world. . . . Their spying has been done long ago about this country, and more particularly so, California, and the results are shown now. Japan intends to make California its Manchurian fields."

Id. (quoting *Yellow Peril*, ORGANIZED LABOR, Mar. 11, 1905).

38. *Hearings on H.R. 5499, supra* note 8, at 58-59.

39. PERSONAL JUSTICE DENIED, *supra* note 30, at 33.

40. *Hearings on H.R. 5449, supra* note 8, at 59.

41. *Id.*

42. PERSONAL JUSTICE DENIED, *supra* note 30, at 30.

43. *Hearings on H.R. 5499, supra* note 8, at 58.

44. TENBROEK, *supra* note 29, at 50-51.

45. *Id.* at 50-57.

46. PERSONAL JUSTICE DENIED, *supra* note 30, at 42.

than their white counterparts.⁴⁷ As a result, white laborers came to resent the competition, and organized labor unions excluded Japanese immigrants from the jobs their members wanted.⁴⁸ To protect its members from this competition, organized labor worked with the agricultural community to secure exclusion legislation to limit or prevent further Japanese immigration.⁴⁹

As Japanese immigrants became more prosperous, the prejudices against them, which politicians and the media had helped to fuel, grew stronger.⁵⁰ Anti-Japanese sentiment was soon manifested in anti-Japanese legislation. Discriminatory legislation first manifested itself in local ordinances. In 1906, the San Francisco Board of Education adopted a resolution to segregate Asian from white students.⁵¹ School segregation soon became a matter of international diplomacy,⁵² and President Theodore Roosevelt intervened in the board's actions.⁵³ The President viewed the San Francisco resolution as violating United States treaties guaranteeing Japanese citizens in the United States certain civil rights,⁵⁴ and therefore convinced the board to rescind its order.⁵⁵

At the same time, the California legislature was entertaining the passage of state-wide anti-Japanese legislation.⁵⁶ In return for California's promise not to pass this legislation, President Roosevelt "promised to do something about Japanese immigration."⁵⁷ He kept his promise. On March 14, 1907, Theodore Roosevelt issued an "Executive Order

47. D. DAVIS, *BEHIND BARBED WIRE, THE IMPRISONMENT OF JAPANESE AMERICANS DURING WORLD WAR II* 15 (1982).

48. *Id.* at 15. Anti-Japanese unions and organizations included: the International Seamen's Union of the Pacific, TENBROEK, *supra* note 29, at 33; the shoemakers' union, cook's and waiter's unions, *id.* at 33; the American Federation of Labor (AFL), *id.* at 34; the Japanese and Korean Exclusion League (JKEL), *id.* at 35-36; the Associated Anti-Japanese Leagues, *id.* at 36; the Anti-Jap Laundry League, *id.*; Union Labor Party of San Francisco, *id.* at 36; Japanese Exclusion League, *id.* at 38; American Legion, *id.* at 43; The Native Sons of the Golden West, *id.* at 46; California State Farm Bureau Federation, *id.* at 51; California State Grange, and National Grange, *id.* at 54; Retail Grocer's Association, *id.* at 58; California State Federation of Labor, PERSONAL JUSTICE DENIED, *supra* note 30 at 34; California Joint Immigration Committee, *id.* at 34; as well as others. See TENBROEK, *supra* note 29, at 32-67.

Few groups opposed anti-Japanese legislation. However, big business generally did not favor anti-Japanese legislation because of its adverse effect on American trade with Japan. TENBROEK, *supra* note 29, at 61.

49. TENBROEK, *supra* note 29, at 38.

50. D. DAVIS, *supra* note 47, at 14.

51. See *Hearings on H.R. 5449*, *supra* note 8, at 58-59.

52. PERSONAL JUSTICE DENIED, *supra* note 30, at 33.

53. *Hearings on H.R. 5499*, *supra* note 8, at 59.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

barring further Japanese immigration from Hawaii, Mexico and Canada."⁵⁸ In 1907, the United States and Japan entered the "Gentlemen's Agreement"⁵⁹ under which Japan agreed to limit immigration to the United States to "laborers who [had] already been in America and to parents, wives, and children of laborers already resident there."⁶⁰

Although the "Gentlemen's Agreement" significantly curtailed Japanese immigration, resentment and prejudice toward the Japanese continued to grow.⁶¹ In 1913, California enacted its own anti-Japanese legislation. The 1913 California Alien Land Act⁶² prevented non-citizens from buying agricultural land or leasing it for more than three years.⁶³ Although racially neutral on its face, the law was clearly aimed at Japanese and Chinese immigrants.⁶⁴ Not only were these two groups prominent in agriculture, but they also could not become United States citizens because of a 1790 immigration law which provided that only "free whites" could become naturalized citizens.⁶⁵ They were thus effectively prohibited from purchasing agricultural land or leasing it for any significant period.

Anti-Japanese sentiment subsided from 1914 to 1918 while Japan fought alongside the United States in World War I.⁶⁶ However, by 1920, the push for discriminatory legislation was once again at the forefront.⁶⁷ In 1920, an initiative was passed in California which attempted to close loopholes in the Alien Land Act of 1913.⁶⁸ The initiative prevented fur-

58. PERSONAL JUSTICE DENIED, *supra* note 30, at 33 (footnote omitted).

59. *Id.* at 34.

60. *Id.*

61. *Id.* at 34-36.

62. California Alien Land Act, ch. 113, 1913 Cal. Stat. 206, *repealed by* Act of Sept. 7, 1955, ch. 27, § 1, 1955 Cal. Stat. 471.

63. *Id.*

64. The Japanese and Chinese were not specifically mentioned in the law. But the law encompassed only "'aliens ineligible to citizenship,' a group limited to the [Japanese and Chinese]." D. DAVIS, *supra* note 47, at 17.

65. *Hearings on H.R. 5499, supra* note 8, at 59. The Alien Land Act's ineffectiveness soon disappointed its proponents. PERSONAL JUSTICE DENIED, *supra* note 30, at 34. The Alien Land Act's purpose was thwarted by immigrants whose children were born in the United States. *Id.* These children, as United States citizens, could own land. *Id.* Title would be taken in a child's name, and his parents would control the property as the child's guardians. Immigrants who did not have children merely vested title in those who were citizens. *Id.* They also avoided the law by setting up corporations nominally headed by Caucasians; they were then able to buy land through these corporations. D. DAVIS, *supra* note 47, at 17. Furthermore, since leasing land to the Japanese was still allowed, they continued to prosper as tenant farmers. TENBROEK, *supra* note 29, at 51.

66. *Hearings on H.R. 5499, supra* note 8, at 59.

67. PERSONAL JUSTICE DENIED, *supra* note 30, at 34-35.

68. *Id.* at 35.

ther transfers and leases of land to Japanese nationals, "barred any corporation in which Japanese held a majority of stock from leas[ing] or purchas[ing] . . . land, and prohibited immigrant parents from serving as guardians for their minor children."⁶⁹ Similar legislation was passed in Arizona, Washington and Oregon.⁷⁰

Anti-Japanese legislation reached its zenith in 1924 when Congress passed the Asian Exclusion Act⁷¹ which terminated all Japanese immigration to the United States.⁷² However, by that time, a significant Japanese population already resided in this country.⁷³ Many immigrants had given birth to children who, by definition, were United States citizens.⁷⁴ Despite discriminatory attitudes and legislation, many of these immigrants decided to make their home in the United States.⁷⁵

In the 1930's, Japan became a powerful and aggressive country.⁷⁶ In 1931, Japan invaded Manchuria.⁷⁷ Later in the 1930's, Japan's invasion of China, desertion of the League of Nations, abandonment of naval limitation agreements and bombing of an American gunboat rekindled fears of a Japanese invasion of the United States.⁷⁸

The stage had been set for an American reaction against the west coast Japanese if Japan took military action against the United States. Years of anti-Japanese sentiment, hostility and prejudice provided the catalyst for the evacuation and internment of the west coast Japanese

69. *Id.* at 35. Initiative No. 1, Statutes and Amendments to the Codes of California, 1921, p. lxxxvii (repealed ch. 316 (1955)). See *supra* note 65 for a discussion of how the immigrants worked around the Alien Land Act's provisions. California's initiative was enacted to close loopholes in the Alien Land Act. *PERSONAL JUSTICE DENIED*, *supra* note 30, at 35. Although the initiative passed by an overwhelming majority, the initiative's guardian provision was subsequently held unconstitutional. *Hearings on H.R. 5499*, *supra* note 8, at 59; *PERSONAL JUSTICE DENIED*, *supra* note 30, at 35.

70. *PERSONAL JUSTICE DENIED*, *supra* note 30, at 35.

71. *Id.* at 36; TENBROEK, *supra* note 29, at 28. Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 66 Stat. 279 (1952)).

72. *Hearings on H.R. 5499*, *supra* note 8, at 59-60. The Asian Exclusion Act of 1924 was specifically aimed at Asian aliens because it prohibited immigration of individuals ineligible for citizenship. *Id.* Since naturalized citizenship was limited to "free white persons" by a 1790 naturalization law, the 1924 Act excluded Asians from United States immigration. D. DAVIS, *supra* note 47, at 17; *Hearings on H.R. 5499*, *supra* note 8, at 59. The 1924 Act was not repealed as to Japanese immigration until 1952. *Id.* at 60 (footnote omitted). Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 66 Stat. 279 (1952)).

73. *Hearings on H.R. 5499*, *supra* note 8, at 60.

74. *Id.*; U.S. CONST. amend. XIV, § 1. Section 1 of the fourteenth amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." *Id.*

75. *Hearings on H.R. 5499*, *supra* note 8, at 60.

76. *PERSONAL JUSTICE DENIED*, *supra* note 30, at 37.

77. TENBROEK, *supra* note 29, at 28.

78. *Id.* at 28-29.

following the bombing of Pearl Harbor. "The seeds of suspicion and distrust sown by pressure groups over the preceding quarter-century . . . [resulted in] spontaneous hostile acts and expressions against resident Japanese . . . [giving] a clear preview . . . of the subsequent reaction . . . to the Japanese attack on Pearl Harbor."⁷⁹ These anti-Japanese sentiments and stereotypes formed "the basis [on] which, in large part, the wartime evacuation of the Japanese . . . was authorized, executed, and approved."⁸⁰

B. World War II and the Internment of Those of Japanese Ancestry

Shortly after the bombing of Pearl Harbor, President Franklin D. Roosevelt signed Executive Order 9066.⁸¹ This order permitted the Secretary of War and military commanders to issue civilian exclusion orders barring all persons of Japanese ancestry, including United States citizens, from certain west coast areas.⁸² The exclusion was ostensibly ordered due to fear that those of Japanese ancestry were spies for the Japanese government.⁸³ The military alleged that the internment was necessary because it lacked the time to quickly and efficiently differentiate those loyal to the United States from the disloyal.⁸⁴ Approximately 120,000

79. *Id.* at 29.

80. *Id.* at 22 (footnote omitted).

81. PERSONAL JUSTICE DENIED, *supra* note 30, at 2. Pearl Harbor was bombed on December 7, 1941. Executive Order No. 9066, issued February 19, 1942, authorized the Secretary of War to prescribe military areas from which any person could be excluded. Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943). Executive Order No. 9102 created the War Relocation Authority (WRA) to carry out Executive Order No. 9066. Exec. Order No. 9102, 3 C.F.R. 1123 (1938-1943). The WRA was responsible for administration of the relocation centers. Exec. Order No. 9102, § 3(a), 3 C.F.R. 1125 (1938-1943). See B. HOSOKAWA, NISEI, THE QUIET AMERICANS 257-82 (1969); PERSONAL JUSTICE DENIED, *supra* note 30, at 47-92.

82. Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943). The exclusion area included parts of Washington, Oregon, California and Arizona. PERSONAL JUSTICE DENIED, *supra* note 30, at xii. Notably, Hawaii was not included as part of the exclusion area. See *id.* at 16. Less than 2,000 of the 158,000 ethnic Japanese in Hawaii were interned. *Id.* at 16. Their sheer numbers spared them from the treatment imposed on the west coast Japanese. D. DAVIS, *supra* note 47, at 55. It would have been physically impossible to transport and guard so many. *Id.*

It is also interesting to note that no mass exclusion was ordered against German or Italian citizens. PERSONAL JUSTICE DENIED, *supra* note 30, at 3. German-American and Italian-American loyalty was determined through individual hearings. *Korematsu v. United States*, 323 U.S. 214, 241 (1944) (Murphy, J., dissenting). Moreover, the British government held loyalty hearings for 74,000 German and Austrian aliens within its borders within six months after the war's outbreak. Only 2,000 were interned as enemy aliens. *Id.* at 242, n.16 (citing Kempner, *The Enemy Alien Problem in the Present War*, 34 AM. J. INT'L LAW 443, 444-46 (1940)); H.R. REP. NO. 2124, 77th Cong., 2d Sess. 280-81 (1942).

83. PERSONAL JUSTICE DENIED, *supra* note 30, at 7. See also *Korematsu*, 323 U.S. at 217.

84. *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943).

people were excluded and interned in "relocation centers."⁸⁵ No procedure for individual review was available to determine loyalty to the United States.⁸⁶ Congress sanctioned the exclusion by enacting legislation making it a crime to disobey any exclusion order.⁸⁷ And criminal convictions ensued when orders were violated.⁸⁸ The exclusion remained in effect until December 1944.⁸⁹

C. *An Internee's Personal View of the Internment*⁹⁰

This section of the Comment describes, from an internee's point of

85. PERSONAL JUSTICE DENIED, *supra* note 30, at 2-3. These relocation centers were "bleak barrack camps mostly in desolate areas of the West . . . surrounded by barbed wire and guarded by [armed] military police." *Id.* at 2.

86. *Id.* at 2-3.

87. PERSONAL JUSTICE DENIED, *supra* note 30, at 3. Violation of an exclusion order was a misdemeanor. The fine for such a violation was not to exceed \$5,000 or imprisonment for more than 1 year, or both, for each offense. Act of March 21, 1942, ch. 191, 56 Stat. 173 (1942).

88. In *Hirabayashi*, the Supreme Court affirmed Gordon Hirabayashi's criminal conviction for violating a curfew order restricting all persons of Japanese ancestry residing in certain military zones to their place of residence between 8:00 p.m. and 6:00 a.m. 320 U.S. at 83-84, 105. A companion case to *Hirabayashi*, *Yasui v. United States*, 320 U.S. 115 (1943), affirmed Mr. Yasui's criminal conviction for violating a similar curfew order. *Id.* at 116-17. *Korematsu*, 320 U.S. 214, affirmed Mr. Korematsu's criminal conviction for remaining in San Leandro, California, contrary to Civil Exclusion Order No. 34. *Id.* at 215-16, 224. See *infra* notes 137-68 and accompanying text for a more thorough discussion and subsequent case history of the *Hirabayashi*, *Korematsu* and *Yasui* cases.

89. PERSONAL JUSTICE DENIED, *supra* note 30, at 2. Exclusion ended after Roosevelt's election in 1944 when the War Department terminated the exclusion order. *Hohri v. United States*, 782 F.2d 227, 232 (D.C. Cir.), *reh'g en banc denied per curiam*, 793 F.2d 304 (D.C. Cir. 1986), *vacated and remanded*, 107 S. Ct. 2246 (1987) (with instructions to transfer case to the Federal Circuit). Although military authorities had determined prior to the 1944 presidential election that no further military justification for the internment existed, President Roosevelt would not take any action toward terminating the exclusion until after the 1944 election for fear it would adversely affect his voting strength in the West. *Id.*

Individual loyalty reviews were provided in February 1943. *Id.* at 232, n.5. However, release was slow and piecemeal. *Id.* Furthermore, those whose release was authorized could only live in places outside the exclusion areas. *Id.* They still could not return home. Due to administrative delays, the last camp was not closed until March 1946, and detention for many internees was prolonged until then. *Id.* at 232.

90. Because of the humiliation and shame, I could never tell my four children of my true feelings about that event in 1942—I did not want my children to feel the burden of shame and feeling of rejection by their fellow Americans. I wanted them to feel that in spite of what was done to us, this was still the best place in the world to live.

Hearings on S. 2116 Before the Subcomm. on Civil Service, Post Office, and General Services of the Senate Comm. on Governmental Affairs, 98th Cong., 2d Sess. 103 (1984) (testimony of Dr. Mary Oda, former internee) [hereinafter *Hearings on S. 2116*]. Portions of the section entitled *An Internee's Personal View of the Internment* were taken from Dr. Oda's testimony before the Senate Subcommittee on Civil Service, Post Office and General Services. Information not covered in Dr. Oda's testimony was compiled from other sources, as indicated.

Dr. Oda was interned with her family in the relocation center at Manzanar, California.

view, the conditions the internees were forced to endure and the internment's effects on them. In general, the following statements typify the internees' experiences.⁹¹ By delineating the conditions and effects of the internment, others hopefully will realize the severity of the harm committed by the United States government and, further, recognize that the internees deserve compensation for the indignities and property losses they suffered.

1. An internee's view

After the issuance of the exclusion orders, my family was given about two weeks to sell our farm equipment and cars, rent the house and farm and store our personal belongings.⁹² A particularly emotional problem was what to do with our pets. We were, of course, not allowed to bring them with us. Since we could not find any Caucasian friends to care for them, our pets had to be destroyed; it was better than leaving them to starve.⁹³ Before evacuation day, my father reported to a Civil Control Center where he received instructions for the evacuation, a family number and identification tags.⁹⁴ We placed our family number on the identification tags, which we each had to wear, as well as on our luggage.⁹⁵ We were allowed

Id. at 101. At the time of the evacuation, she had almost finished her first year of medical school at the University of California at Los Angeles. *Id.* at 95. She later finished her medical education at the Women's Medical College of Pennsylvania. *Id.* at 101.

See also *Hearings on H.R. 5499, supra* note 8, at 37 (citing Strobel, *The Japanese Americans—Is It Time to Say Sorry?*, San Jose Mercury News, May 11, 1980 (California Today)) (Florence Yoshiwara's recollection that after being released from internment, she "like many other Nisei, 'tried to be white.'"). For insight into the internment's effects on Japanese American citizens who were too young to understand what was happening when interned, see *Hearings on S. 2116, supra*, at 93 (testimony of George Takei) (remembering being afraid, his parents' tension and anxiety, and later once released from internment, the "gnawing sense of shame"). For a contrary view of the evacuation and internment, see *Hearings on S. 2116, supra*, at 380-87 (testimony of Mas Odoi) (former evacuee and 442nd Regimental Combat Team purple heart veteran).

References in this Comment to *Issei* and *Nisei* refer to generations of ethnic Japanese in the United States. *Issei* are the immigrants, or first generation, from Japan. PERSONAL JUSTICE DENIED, *supra* note 30, at 2. *Nisei* are the *Issei*'s sons and daughters, or in other words, the first generation born in the United States. *Id.*

91. Of course experiences varied due to health and financial status prior to internment and individual susceptibilities to conditions in the relocation centers. This section was written in the first person to emphasize the internment's consequences on individuals.

92. *Hearings on S. 2116, supra* note 90, at 96. Some were given as little as 72 hours to evacuate. S. REP. NO. 202, 100th Cong., 1st Sess. 3 (1987). Many were forced to sell belongings at a fraction of their value. D. DAVIS, *supra* note 47, at 48-49.

93. See E. ISHIGO, *LONE HEART MOUNTAIN* 5 (1972).

94. D. DAVIS, *supra* note 47, at 47, 56.

95. *Id.*

to take only what we could carry.⁹⁶ We then assembled at temporary detention centers, usually hastily converted county fairgrounds, race tracks and livestock exhibition halls.⁹⁷ We remained there until the relocation centers were built.⁹⁸

My family was eventually transferred to the relocation center at Manzanar, California.⁹⁹ When we arrived, I was dismayed at the sight of the camp; it looked exactly like a prison. The camp was surrounded by barbed wire and watch towers. Military police with guns patrolled the area.¹⁰⁰ I was accustomed to living in a comfortable four bedroom house—the cramped eight cot room was stifling.¹⁰¹ My family of nine shared this single room with an elderly couple.¹⁰² The room was approximately twenty by twenty-five feet and had no inner wall. Open studs exposed two by four's, and the floor was wooden with one-half inch gaps between the planks.¹⁰³ The winds blew layers of sand and dust up through the floors into the room.¹⁰⁴ The room was not furnished.¹⁰⁵ We slept on

96. *Id.* at 47-48. The internees were only allowed to bring clothing, bedding, linens, kitchen utensils and personal effects. *Id.*

97. D. DAVIS, *supra* note 47, at 51. The assembly "centers [were] circled by barbed wire fences patrolled by armed military police." *Id.* At the Santa Anita Assembly Center, only four days separated the removal of the horses from the stalls that were soon to house the evacuees. *Id.* at 60.

98. B. HOSOKAWA, *supra* note 81, at 343.

99. *Hearings on S. 2116*, *supra* note 90, at 101. Ten relocation centers were established: Poston and Gila in Arizona; Manzanar and Tule Lake in California; Heart Mountain in Wyoming; Minidoka in Idaho; Topaz in Utah; Granada in Colorado; Rohwer and Jerome in Arkansas. D. DAVIS, *supra* note 47, at 67. These centers were located in desolate areas having severe weather conditions. *Id.* at 68. For example, in Minidoka, the average temperature in the summer was 110 degrees. *Id.* At Tule Lake, winter temperatures were often well below zero. *Id.* at 69.

Other camps were also established. Citizen internees suspected of invoking mass demonstrations at the relocation camps were transferred to and held at WRA isolation camps located at Moab, Utah and Leupp, Arizona. PERSONAL JUSTICE DENIED, *supra* note 30, at xii, 179. The Justice Department also controlled camps in Santa Fe, New Mexico; Bismarck, North Dakota; Crystal City, Texas; and Missoula, Montana. *Id.* at xii. These camps held German and Italian nationals whom the FBI suspected of spying, east coast German aliens whom the Justice Department thought dangerous, and a small number of German-American citizens. *Id.* at 284. They also held axis nationals deported from Latin American countries, *id.* at 307 (citing Barnhart, *Japanese Internees from Peru*, 31 PAC. HIST. REV. 169-78 (1962)) and alien internees suspected of invoking mass demonstrations at the relocation centers. *Id.* at 179.

100. *Hearings on S. 2116*, *supra* note 90, at 99.

101. *Id.* at 98.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* Each room at the Heart Mountain camp was scantily furnished with cots, two blankets for each occupant, a coal stove and a bucket and broom. E. ISHIGO, *supra* note 93, at 20.

straw which we stuffed into bags.¹⁰⁶ Later, my little brother made make-shift chairs and a table from a pile of scrap lumber.¹⁰⁷

Life in the camp was "communal." The bathrooms and showers were located in separate barracks from our living quarters.¹⁰⁸ No partitions separated the toilets in the bathrooms.¹⁰⁹ There was a total lack of privacy for basic intimate functions.¹¹⁰ Only a thin dividing partition, not entirely reaching from floor to ceiling, separated our room from other family units.¹¹¹ Families did not dine together in their rooms; we were expected to eat at mess halls.¹¹²

The evacuation's emotional and physical toll was great.¹¹³ Nevertheless, we eventually managed to set up a "normal" life. The War Relocation Authority (WRA) allowed us to elect figurehead governing bodies to facilitate communications with them.¹¹⁴ Although private businesses were

106. *Hearings on S. 2116, supra* note 90, at 98.

107. *Id.*

108. See E. ISHIGO, *supra* note 93, at 25.

109. *Id.*; See also *Hearings on S. 2116, supra* note 90, at 98.

110. *Hearings on S. 2116, supra* note 90, at 98.

111. *Hearings on H.R. 5499, supra* note 8, at 69.

112. See PERSONAL JUSTICE DENIED, *supra* note 30, at 162.

113. Dr. Oda's family was one which suffered greatly during the internment. Dr. Oda developed heart problems during the internment. She attributed them to the submerged anger and frustration she felt at being forced to leave all that was familiar. *Hearings on S. 2116, supra* note 90, at 99. Her younger sister was placed in a mental institution for five months after suffering a nervous breakdown. *Id.* at 100. The severe storms and wind in the Manzanar area caused Dr. Oda's older sister to develop bronchial asthma. *Id.* She died at twenty-six when her condition became incurable. *Id.*

Dr. Oda's oldest brother developed stomach cancer when he was thirty, three years after evacuation. *Id.* He died after surgery. *Id.* Dr. Oda attributed her brother's cancer to a poor daily diet consisting of pickled vegetables, rice and dried fruit preserved with sulfur. From this diet, Dr. Oda concluded that her brother developed an intestinal obstruction which eventually caused stomach cancer. *Id.* At Heart Mountain, the internees were provided with a diet of "salted fish, turnips, some low-grade meat, cabbage, beans, potatoes and rice." E. ISHIGO, *supra* note 93, at 38.

Dr. Oda's father, like her eldest sister, was sensitive to the ever present winds and dust at Manzanar. *Hearings on S. 2116, supra* note 90, at 100. He died from nose and throat cancer stemming from constant nasal irritation. *Id.* Dr. Oda's family had entered camp in good health, yet her sister, brother and father died within seven months of each other, three years after evacuation. *Id.*

Not all deaths were natural. For example, military police panicked and killed two people during a riot at the Manzanar Camp. D. DAVIS, *supra* note 47, at 80-81. And an elderly internee was shot and killed in broad daylight at the Topaz camp when he went too close to the camp's outer fence. *Id.* at 79.

See also *Hearings on H.R. 5499, supra* note 8, at 35 (quoting California Congressman Norman Mineta who was interned at Heart Mountain, Wyoming: "It was like being the victim of a rape . . . You don't want to talk about it, but you can't forget it. You know that you are the innocent victim, but all of a sudden you become the guilty one.").

114. D. DAVIS, *supra* note 47, at 72. These governing councils had no real power. *Id.*

not allowed, we set up a variety of stores and services based on the cooperative system.¹¹⁵

Some of us set up drama and poetry groups.¹¹⁶ We also published our own camp newspaper which was unfortunately, but not unexpectedly, censored heavily.¹¹⁷ We were allowed to receive mail from "the outside." It was of course censored.¹¹⁸ Any forbidden items, such as razors, flashlights, electric irons or radios found in incoming packages were confiscated.¹¹⁹ Although Japanese language Bibles and dictionaries were allowed, all other Japanese language literature was prohibited.¹²⁰

We helped establish schools for the children.¹²¹ Those of us who were qualified taught in the schools alongside WRA instructors.¹²² Besides teaching positions, the WRA provided a variety of other jobs for those of us who wanted them.¹²³ Jobs were available in administrative offices, mess halls, laundries and health clinics, as well as other places.¹²⁴ Some of us worked in WRA factories where we produced materials, such as camouflage nets, needed for the war.¹²⁵ Our pay scale for these jobs was low.¹²⁶

Eventually, the government made provisions for releasing some of us.¹²⁷ I was released on a special student program.¹²⁸ My three living

115. *Id.*

116. *Id.* at 73.

117. *Id.* at 63.

118. *Id.* at 77.

119. E. ISHIGO, *supra* note 93, at 9; D. DAVIS, *supra* note 47, at 77.

120. D. DAVIS, *supra* note 47, at 63. The *Issei* often did not read English. The prohibition against Japanese language literature was particularly hard on them. At Manzanar, speaking Japanese in public meetings was forbidden. A. BOSWORTH, *supra* note 1, at 151.

121. See B. HOSOKAWA, *supra* note 81, at 348-50.

122. *Id.*

123. D. DAVIS, *supra* note 47, at 73.

124. *Id.*; E. ISHIGO, *supra* note 93, at 24.

125. A. BOSWORTH, *supra* note 1, at 147-48.

126. The pay scale was as follows: unskilled labor, \$8.00/month; skilled labor, \$12.00/month; and for professionals such as doctors, dentists, nurses and technicians, \$16-\$19/month. *Id.* at 146; D. DAVIS, *supra* note 47, at 63. Internees were paid far less than their Caucasian WRA personnel counterparts, even though WRA personnel were often less qualified. *Id.* Although the wages were low, internees found it necessary to work because each family's \$7.50 monthly allowance was rarely sufficient to pay for clothes and other necessities the government did not provide. *Id.*

127. *Hearings on S. 2116*, *supra* note 90, at 101. Release began in fall, 1942. D. DAVIS, *supra* note 47, at 83. However, before release, each individual needed an FBI security clearance "to assure host communities the [evacuee was] 'loyal.'" B. HOSOKAWA, *supra* note 81, at 355. Release to banned exclusion areas was, of course, not allowed. D. DAVIS, *supra* note 47, at 88. To speed release, in February 1943 the WRA determined that loyalty oaths should be given to *Nisei* army volunteers. *Id.* at 87. These loyalty oaths were contained in a questionnaire that all internees, whether applying for release or not, were required to complete. *Id.* The "loyalty" questions read: "Are you willing to serve in the armed forces of the United States, in combat duty, wherever ordered?" and "Will you swear unqualified allegiance to the

brothers were released to serve in the United States Armed Forces.¹²⁹ Others obtained their freedom by agreeing to work outside the exclusion areas.¹³⁰ Some, especially the elderly, however, remained interned until unconditional release was announced in December 1944.¹³¹

United States of America and faithfully defend the United States from any and all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, or any other foreign government, power, or organization?" *Id.* See D. DAVIS, *supra* note 47, at 87-90 and B. HOSOKAWA, *supra* note 81, at 364-65 for discussions of the problems these two questions created. A "yes" answer to both questions was required to be eligible for army enlistment or camp leave. D. DAVIS, *supra* note 47, at 87.

128. *Hearings on S. 2116*, *supra* note 90, at 101-02. By fall 1942, hundreds of *Nisei* students were released to attend school under the National Student Relocation Council's authority. B. HOSOKAWA, *supra* note 81, at 355.

129. *Hearings on S. 2116*, *supra* note 90, at 102. See *supra* note 127. For a short discussion of the important role Japanese Americans played as interpreters in the Army Intelligence Service, see D. DAVIS, *supra* note 47, at 98-99. For a discussion of their role as combat soldiers in the highly decorated all Japanese American combat units of the 442nd Regimental Combat Team and the 100th Infantry Battalion, see *id.* at 100-12.

130. See *supra* notes 127-28.

131. On Sunday, December 17, 1944, the WRA announced that all camps would be closed by the end of 1945. D. DAVIS, *supra* note 47, at 123; P. IRONS, *supra* note 6, at 345. This announcement preceded the Supreme Court's decision in *Ex parte Endo*, 323 U.S. 283 (1944), by one day. D. DAVIS, *supra* note 47, at 123. In *Ex parte Endo*, the Supreme Court held that the WRA did not have authority to detain Mitsuye Endo, a concededly loyal Japanese American citizen, and that unconditional release was warranted. 323 U.S. at 302-04. The Court, however, avoided deciding whether detention was unconstitutional. *Id.* at 297. Had the WRA not announced the closing of the camps, the *Endo* decision would have required the WRA to release all loyal internees. D. DAVIS, *supra* note 47, at 123. See P. IRONS, *supra* note 6, at 99-100 for a discussion of how Mitsuye Endo was chosen by her attorney to challenge governmental detention.

Final release from camps was not easy for the internees. D. DAVIS, *supra* note 47, at 126-30. Some had been interned for as long as four years. See A. BOSWORTH, *supra* note 1, at 254-57 (chronology showing that the first large group of internees was moved to the Manzanar Assembly Center on March 22, 1942 and that the Tule Lake Center was closed on March 20, 1946). Many internees, especially the elderly, were afraid to leave the camps. D. DAVIS, *supra* note 47, at 128. And once they did leave, many were met with hostility. *Id.* at 128-29. Furthermore, they had nothing to return to. *Id.* at 126. Stored property had been taken or vandalized. *Id.* at 127-28. Their homes and former jobs were gone. *Id.* at 126. Real property had been taken or foreclosed on to pay for delinquent property taxes or mortgage payments. PERSONAL JUSTICE DENIED, *supra* note 30, at 117, 127-29, 133.

One estimate indicated economic losses due to the internment, in 1945 dollars, of between \$108 million to \$164 million in income and between \$11 million to \$206 million in property. SUMMARY AND RECOMMENDATIONS OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 27 (edited and printed by the Japanese American Citizens League 1983). These figures do not include amounts compensated under the Japanese American Evacuation Claims Act. See *infra* notes 283-89 and accompanying text for a discussion of the American-Japanese Evacuation Claims Act. In 1983 dollars, adjusted only for inflation, the total losses are between \$810 million and \$2 billion. *Id.* The Federal Reserve Bank of San Francisco valued property losses at \$400 million in 1942 dollars. PERSONAL JUSTICE DENIED, *supra* note 30, at 120; D. DAVIS, *supra* note 47, at 138. The CWRIC, however, questioned this figure as unsubstantiated. PERSONAL JUSTICE DENIED,

After release, life was especially hard on my mother. When she returned to our former home, everything was gone.¹³² As a result, my mother, a former teacher in Japan, was forced to work as a farm stoop laborer.¹³³ With the \$1,800 eventually received from the government for the family's losses, my mother bought the gravestone under which she buried the ashes of my father, eldest brother and sister who had died during the internment.¹³⁴

2. Effect of the internment

Relocation and internment was not a "mere inconvenience to Japanese-Americans."¹³⁵ Yet, most of the internees bore this indignity without protest. They "held to traditional Japanese attitudes of obedience to authority and acceptance of fate."¹³⁶ However, a few did challenge the curfew and exclusion orders. These challenges are discussed in the next section.

D. Constitutional Challenges to the Curfew and Exclusion Orders: *The Hirabayashi and Korematsu Cases*

In *Hirabayashi v. United States*,¹³⁷ decided in June 1943, the defend-

supra note 30, at 120. Of the \$148 million claimed under the Evacuation Claims Act, the government only paid \$37 million. *Id.* at 118. Because of inflation and because the government based its payments on the 1942 dollar, the internees were actually compensated at the rate of 10 cents on the dollar. D. DAVIS, *supra* note 47, at 139; Dubro, *The Japanese-American Internment*, 3 CAL. LAW. 25, 31 (1983).

The discrepancies in estimated losses have resulted from lack of records. PERSONAL JUSTICE DENIED, *supra* note 30, at 118-19. The internees' personal records were lost along with other property left behind. *Id.* at 119. They understandably did not bring records to the camps with them; their main concern was to bring necessities such as food, medicine and clothing. State and federal records have also been lost. "[U]nder Federal and State codes, most of the Government records of 1942 . . . have been destroyed pursuant to law." *Id.* (footnote omitted). The Internal Revenue Service's income tax return records were destroyed prior to 1948 when compensation under the Evacuation Claims Act began. *Id.* at 118.

Despite these losses, the government provided only minimal assistance to help evacuees adjust to outside life. *Id.* at 241-42; D. DAVIS, *supra* note 47, at 126-28. The government gave the internees train fare and a \$25.00 allowance. PERSONAL JUSTICE DENIED, *supra* note 30, at 241. Once they arrived at their destinations, they often could not find housing because of postwar shortages and discrimination. *Id.* Discrimination also often blocked employment in other than menial jobs. *Id.* at 242.

132. *Hearings on S. 2116, supra* note 90, at 96.

133. *Id.* at 103.

134. *Id.* See *infra* note 287 for a discussion of compensation under the American-Japanese Evacuation Claims Act.

135. 133 CONG. REC. H7557 (daily ed. Sept. 17, 1987) (statement of Rep. Mineta).

136. D. DAVIS, *supra* note 47, at 56.

137. 320 U.S. 81 (1943). The Court considered only the constitutionality of the curfew order and not the defendant's conviction for failing to report to a Civil Control Station in

ant's criminal conviction for violating a curfew order imposed on those of Japanese ancestry was upheld as a constitutional exercise of Congress' and the President's war powers.¹³⁸ The Supreme Court held that it would defer to the military's judgment so long as the decision to enact the curfew order was rationally related to the circumstances of the situation.¹³⁹ The Court, therefore, relied on the military's assertion that no prompt and adequate means existed to differentiate disloyal persons of Japanese ancestry from the loyal.¹⁴⁰

In December 1944, the Supreme Court again upheld the criminal conviction of a United States citizen of Japanese ancestry for violating a military exclusion order in *Korematsu v. United States*.¹⁴¹ The defendant had been found guilty of remaining in an area declared off-limits to those of Japanese ancestry, in violation of Exclusion Order No. 34.¹⁴² In affirming this conviction, the *Korematsu* Court relied heavily on *Hirabayashi*.¹⁴³

preparation for evacuation from a military exclusion area. The Court reasoned that since the defendant's three month sentences for each violation were to run concurrently, it would be unnecessary to consider the failure to report conviction if the curfew order conviction was sustained. *Id.* at 85.

Mr. Hirabayashi violated a curfew order requiring all persons of Japanese ancestry residing in certain areas to remain in their residences between the hours of 8:00 p.m. and 6:00 a.m. Public Proclamation No. 3, 7 Fed. Reg. 2543 (1942) [hereinafter Curfew Order]. Civilian Exclusion Order No. 57 required all persons of Japanese ancestry within specified areas to report for registration at designated Civil Control Stations. 7 Fed. Reg. 3725 (1942).

Hirabayashi was an upstanding citizen and an exemplary student enrolled at the University of Washington. See *Hirabayashi v. United States*, 627 F. Supp. 1445, 1447 (W.D. Wash. 1986), *aff'd in part and rev'd in part*, 828 F.2d 591 (9th Cir. 1987). He was also a YMCA leader and a Boy Scout. *Id.* He was a native-born American citizen, had never been to Japan and had never corresponded with anyone in Japan. *Id.* Hirabayashi's only connection with Japan was his ancestry. See *id.* Hirabayashi explained that the reason he did not report to the civilian control center or obey the curfew order was because he felt the orders were "unconstitutional and violated his rights as an American citizen and that . . . to obey them voluntarily would have been a waiver of his rights." *Id.*

Yasui v. United States, 320 U.S. 115 (1943), was the companion case to *Hirabayashi*. In *Yasui*, an American-born attorney of Japanese ancestry purposely violated the curfew order to test its constitutionality. *Id.* at 116-17. The Supreme Court relied on *Hirabayashi* to find the curfew order constitutional even as to United States citizens. *Id.* at 117. Thus, *Yasui's* conviction was sustained, although the judgment was vacated to allow the district court to strike its finding that *Yasui* had lost his United States citizenship. *Id.*

138. *Id.* at 101-02.

139. *Id.* at 103-04.

140. *Id.* at 99.

141. 323 U.S. 214 (1944).

142. *Id.* at 215-16. The constitutionality of the military's exclusion order, which was not reached by the *Hirabayashi* Court, was decided in *Korematsu*. *Id.* at 218-19.

143. *Id.* The court in dictum indicated that the burden of being interned was part of the responsibilities of citizenship.

In [upholding the exclusion order], we are not unmindful of the hardships imposed

The *Korematsu* Court held that because it could not reject the military's claim that it was impossible to quickly and efficiently distinguish the loyal from the disloyal, the temporary exclusion of all persons of Japanese ancestry from the west coast was constitutionally permissible.¹⁴⁴ The Court cited the presence of "real military dangers," the "military urgency" of the situation and the fact that "time was short" as justifications for the exclusion.¹⁴⁵ The Court refused to second-guess the government's assertion that the exclusion was justified by military urgency; it would not "—by availing [itself] of the calm perspective of hindsight—now say that at [the time Hirabayashi was convicted] these actions were unjustified."¹⁴⁶ The Court was content to let the military's justification for the exclusion stand as the basis of its decision without carefully analyzing the reasons behind the exclusion orders.¹⁴⁷

III. RECENT ACTION

A. *The Re-opening of the Hirabayashi Case*

Over forty years after the Supreme Court affirmed his criminal convictions for violating curfew and exclusion orders during World War II, Gordon Hirabayashi filed a petition for writ of error *coram nobis*¹⁴⁸ requesting that the court vacate his convictions.¹⁴⁹ The district court va-

by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.

Id. at 219.

144. *Id.* at 218-19.

145. *Id.* at 223-24.

146. *Id.*

147. Ironically, Justice Black, writing for the Court stated in dictum: "Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice." *Id.* at 223.

148. A writ of error *coram nobis* is an extraordinary writ that allows a convicted criminal defendant, even long after he has served his sentence, to have his conviction vacated to correct fundamental errors or prevent manifest injustice. 28 U.S.C. § 1651(a) (1982); *United States v. Morgan*, 346 U.S. 502 (1954) (holding that under 28 U.S.C. § 1651(a), a federal district court has power to issue a writ of error *coram nobis*). To avail himself of the writ of *coram nobis*, the petitioner must meet certain requirements. The petitioner must: 1) bring the petition in the court where he was convicted; 2) demonstrate that a more usual remedy is not available; 3) satisfy the case and controversy requirement of article III by showing that he presently suffers adverse consequences from the conviction; 4) show valid reasons existed for not attacking the conviction earlier; 5) show that the error was fundamental; and 6) show that a different result was probable had the error not been made. *Hirabayashi v. United States*, 627 F. Supp. 1445, 1454-55 (W.D. Wash. 1986) (citations omitted), *aff'd in part and rev'd in part*, 828 F.2d 591 (9th Cir. 1987).

149. *Hirabayashi*, 627 F. Supp. 1445. The re-opening of the *Hirabayashi* case was made possible by discoveries made by the Commission on Wartime Relocation and Internment of

cated Hirabayashi's conviction for violating the exclusion order, but upheld the conviction for violating the curfew order.¹⁵⁰ In vacating the

Civilians (CWRIC). *Id.* at 1455-56. The CWRIC was established by Congress in 1980. Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, 94 Stat. 964 (1980). The commission was established because "no significant study ha[d] been done by the Government to determine the extent of any civil rights violations" during the internment, H.R. REP. NO. 1146, 96th Cong., 2d Sess. 5 (1980), and to investigate a Senate Committee's finding that the "[i]nternees were deprived of their liberty and property apparently based on their ethnic origins alone." S. REP. NO. 751, 96th Cong., 2d Sess. 2 (1980). Therefore, one purpose of the commission was to investigate the internment and its impact. PERSONAL JUSTICE DENIED, *supra* note 30, at 1. The commission was also to recommend appropriate remedies. *Id.*

In 1982, the CWRIC issued its findings in a report entitled PERSONAL JUSTICE DENIED. *Id.* The CWRIC found that no military necessity existed to exclude and intern the ethnic Japanese. *Id.* at 18. The CWRIC recognized that the exclusion was based on "race prejudice, war hysteria and a failure of political leadership." *Id.*

What made the reopening of *Hirabayashi*, and later *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984), possible was the finding that the War Department had purposely concealed its reason for ordering the internment from the Justice Department. *Hirabayashi*, 627 F. Supp. at 1456-57; *Korematsu*, 584 F. Supp. at 1417-19. The War Department's asserted reason for the internment was lack of time to separate loyal from disloyal ethnic Japanese. *Id.* at 1449-52. The person who determined that military necessity required exclusion was Lieutenant General John L. DeWitt, Commanding General of the Western Defense Command. *Id.* at 1448, 1456. However, his actual reason for ordering the exclusion was that it was impossible to distinguish loyal from disloyal ethnic Japanese, not that "there was insufficient time in which to make such a determination." *Id.* at 1449. General DeWitt's reasoning was purposely omitted from the War Department's final report. *Id.* at 1449-52. The Justice Department therefore relied on erroneous information when it prepared its brief to the Supreme Court opposing *Hirabayashi*'s appeal. *Id.* at 1454. Thus, the fundamental error that allowed the district court to grant *Hirabayashi*'s petition for writ of *coram nobis* was the War Department's failure to disclose the true reason for the exclusion order. *Id.* at 1456. The district court found that:

[i]f the asserted ground [had been known] by the Supreme Court to be the impossibility of separating the loyal from the disloyal, the Supreme Court would have found itself in an area of inquiry where its collective wisdom and . . . experience were far greater than . . . DeWitt[s]. The justices . . . were intimately familiar with the process of factual determinations. . . . [T]he Supreme Court would not have had to defer to military judgment because this particular problem, separating the loyal from the disloyal, was one calling for judicial, rather than military, judgment.

Id. at 1457. For a thorough discussion of the War Department's concealment, see P. IRONS, *supra* note 6, at 186-218.

Minoru Yasui also filed a writ of error *coram nobis*. *Yasui v. United States*, 772 F.2d 1496, 1498 (9th Cir. 1985). In his petition, Mr. Yasui requested the court to declare the curfew order which he had been convicted of violating unconstitutional, to dismiss his indictment and vacate his conviction. *Id.* at 1498. The district court dismissed Yasui's indictment and vacated his conviction, without finding that his constitutional rights had been violated. *Id.* Yasui appealed to the Ninth Circuit Court of Appeals for a finding that his constitutional rights had been violated. *Id.* The court of appeals held that Yasui's appeal was untimely and remanded the case to allow him to show excusable neglect. *Id.* at 1499-1500. The appeal, however, was subsequently dismissed as moot due to Mr. Yasui's death. *Hirabayashi*, 828 F.2d at 594 n.4.

150. *Hirabayashi*, 627 F. Supp. at 1457. To grant a writ of *coram nobis*, the court must find

exclusion order, the district court found that the War Department's failure to disclose information in 1943 when the Supreme Court upheld Hirabayashi's conviction prejudiced the defendant.¹⁵¹

In the government's opposition to Hirabayashi's original appeal to the Supreme Court, the Justice Department's attorneys assumed and argued that the reason for the exclusion was the need for prompt action.¹⁵² The "whole thrust of the government's argument . . . was that there was not sufficient time to make a differentiation between the loyal Japanese and those who might be disloyal."¹⁵³ However, the need for prompt action was not the reason given by Lieutenant General John L. DeWitt¹⁵⁴ in his final report to the War Department urging exclusion.¹⁵⁵ DeWitt stated that his reason for the exclusion was "the impossibility of separating the loyal persons from the disloyal ones *no matter how much time was devoted to that task*," not that insufficient time existed to make the deter-

a fundamental error that prejudiced petitioner's case. *See supra* note 149. In *Hirabayashi*, the court reasoned that the fundamental error that allowed Hirabayashi's conviction for violating the exclusion order to be overturned was not "fundamental" as to the curfew order. 627 F. Supp. at 1457. The court held that non-disclosure of the true reason for the exclusion was not a fundamental error with respect to the curfew violation since even if it had been revealed, it would not have changed the Supreme Court's ruling. *Id.* The "reason for the exclusion did not significantly undermine the earlier issuance of the curfew order." *Id.* The error was therefore not prejudicial as to the curfew violation, and a writ of *coram nobis* on that conviction was not appropriate. *Id.*

On appeal, the Ninth Circuit Court of Appeals found that the district court had "erred in distinguishing between the validity of the curfew and exclusion convictions." *Hirabayashi*, 828 F.2d at 608. The court reasoned that just because the curfew order was a lesser restriction on freedom than the exclusion order, it did not necessarily follow that the Supreme Court would have found the curfew order constitutional and the exclusion order unconstitutional. *Id.* at 608. Both restrictions were "equally based on . . . the difficulty of classifying American citizens" *Id.* (citing Edward Ennis' testimony at an evidentiary hearing before the district court in *Hirabayashi v. United States*, 627 F. Supp. 1145 (W.D. Wash. 1986), *aff'd in part and rev'd in part*, 828 F.2d 591 (9th Cir. 1987)).

151. *Hirabayashi*, 627 F. Supp. at 1457.

152. *Id.* at 1456.

153. *Id.* This statement was made by Edward Ennis, Director of the Alien Enemy Control Unit of Department of Justice, in charge of preparing the government's brief before the Supreme Court in *Hirabayashi v. United States*, 320 U.S. 81 (1943). *Hirabayashi*, 627 F. Supp. at 1449. Ennis testified during the hearing on Hirabayashi's petition for writ of *coram nobis* that if the real reason for the internment had been known in 1943, the government would have had "a very serious problem" with its case; "it would have been 'very dangerous' to take [the] position [that it was impossible to distinguish loyal from disloyal ethnic Japanese] before the Supreme Court." *Id.* at 1456.

154. Lieutenant General John L. DeWitt was the Commanding General of the Western Defense Command. DeWitt recommended the exclusion to Secretary of War, Henry L. Stimson. In turn, President Franklin D. Roosevelt relied on Secretary Stimson's recommendation to order the exclusion. PERSONAL JUSTICE DENIED, *supra* note 30, at 6.

155. *Hirabayashi*, 627 F. Supp. at 1456.

mination.¹⁵⁶ DeWitt's conclusion clearly was based on his expressed distrust of the Japanese as a race.¹⁵⁷

DeWitt's original report was intentionally kept from the Justice Department.¹⁵⁸ The Justice Department therefore prepared its brief to the Supreme Court in the original *Hirabayashi* case assuming that the basis for the exclusion was the need for prompt action.¹⁵⁹ In ruling on Mr. Hirabayashi's petition for writ of *coram nobis*, the district court found that if DeWitt's reason for the exclusion had been known at the time, the "Supreme Court would not have had to defer to military judgment."¹⁶⁰ The loyal could have been separated from the disloyal—"with very little effort the determination could have been made that tens of thousands of native-born Japanese Americans—infants in arms, children of high school age or younger, housewives, the infirm and elderly—were loyal and posed no possible threat to this country."¹⁶¹ The district court therefore vacated Hirabayashi's conviction for violating the exclusion order because the government's concealment of its reason for ordering the

156. *Id.* (emphasis added). DeWitt's personal prejudices motivated his decision to order the exclusion. In his recommendation to Stimson, DeWitt stated:

In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized," the racial strains are undiluted. . . . It . . . follows that along the vital Pacific Coast over 112,000 potential enemies of Japanese extraction, are at large today.

PERSONAL JUSTICE DENIED, *supra* note 30, at 66 (quoting J. DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 34 (1942)). "There are indications that these are organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken." *Hohri v. United States*, 782 F.2d 227, 231 (D.C. Cir.), *reh'g en banc denied per curiam*, 793 F.2d 304 (D.C. Cir. 1986), *vacated and remanded*, 107 S. Ct. 2246 (1987) (with instructions to transfer case to the Federal Circuit). DeWitt's racial animus was further shown in his statements before a Congressional committee: "[W]e must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area—problems which I don't want to have to worry about." PERSONAL JUSTICE DENIED, *supra* note 30, at 66.

157. PERSONAL JUSTICE DENIED, *supra* note 30, at 66.

158. *Hirabayashi*, 627 F. Supp. at 1454. The War Department destroyed copies of DeWitt's final report and placed any remaining records in a confidential file. P. IRONS, *supra* note 6, at 211-12. The revised final report in which the War Department changed its reason for the exclusion from inability to distinguish the loyal from disloyal to insufficient time to make the determination was not provided to the Justice Department. *Hirabayashi*, 627 F. Supp. at 1449-52. The War Department did not release the revised final report until January 1944, seven months after the Supreme Court's decision in *Hirabayashi*. P. IRONS, *supra* note 6, at 212. For the actual revisions made in DeWitt's original report to disguise the true reason for the exclusion, see *Hirabayashi*, 627 F. Supp. at 1449-54.

159. *Hirabayashi*, 627 F. Supp. at 1454.

160. *Id.* at 1457.

161. *Id.* at 1456. See also P. IRONS, *supra* note 6, at 208.

exclusion had prejudiced Hirabayashi's case.¹⁶²

The Ninth Circuit Court of Appeals subsequently vacated Hirabayashi's curfew order conviction as well.¹⁶³ The court of appeals reasoned that the district court had erred by distinguishing the curfew order from the exclusion order on the basis that the curfew was a lesser restriction on freedom.¹⁶⁴ "It does not follow . . . that the Supreme Court would have made such a distinction had it been aware of the suppressed evidence."¹⁶⁵

B. Vacating Korematsu's Conviction

Korematsu, likewise petitioned the court for writ of error *coram nobis* on the basis of governmental misconduct.¹⁶⁶ On April 19, 1984, the District Court of the Northern District of California vacated Korematsu's conviction for violating an exclusion order.¹⁶⁷ The court concluded that since relevant evidence concerning the military necessity for the internment had been withheld during the original proceeding, Korematsu's petition should be granted.¹⁶⁸

C. The Class Action Suit—Hohri v. United States

In addition to *Hirabayashi*¹⁶⁹ and *Korematsu*,¹⁷⁰ a class action was

162. *Hirabayashi*, 627 F. Supp. at 1454, 1457-58. While no evidence indicated that the Justice Department knowingly concealed DeWitt's reason for the exclusion, the district court charged the government with the "concealment because it was information known to the War Department, an arm of the government." *Id.*

163. *Hirabayashi*, 828 F.2d 591.

164. *Id.* at 608.

165. *Id.* See *supra* note 150.

166. *Korematsu v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984). The government filed a counter-motion to vacate Korematsu's conviction and dismiss the underlying indictment. *Id.* at 1410. In its response, the government requested that the court grant Korematsu's petition without looking into the merits of his contentions. *Id.* Apparently, the government agreed that the conviction should be vacated, but was unwilling to confess that it had previously been wrong. *Id.* at 1413. The court, however, found that a limited review was necessary. *Id.* at 1412.

167. *Id.* at 1406, 1420.

168. *Id.* at 1419. The relevant evidence withheld from the Court was information known to the Federal Communications Commission, the Department of the Navy and the Justice Department regarding the lack of military necessity for the internment. *Id.* at 1418-19. The Justice Department and military officials other than General DeWitt considered this information reliable. *Id.* at 1418. However, the government's brief, and the State of California's brief as amicus curiae for the government, relied heavily on DeWitt's revised report. *Id.* at 1418 & n.9. Contrary relevant evidence was purposely omitted from the government's brief. *Id.* at 1418. "Thus, the Court had before it a selective record." *Id.* at 1419. For a more complete discussion of the evidence withheld, see *supra* notes 152-62 and accompanying text.

169. 627 F. Supp. 1445 (W.D. Wash. 1986), *aff'd in part and rev'd in part*, 828 F.2d 591 (9th Cir. 1987).

filed in 1983 against the United States on behalf of all internees and, if no longer living, their representatives. The named plaintiffs were nineteen internees and descendants of internees and an organization of Japanese Americans.¹⁷¹ The complaint, which contained twenty-two causes of action, requested compensatory damages for each tort claim and \$10,000 for each of the other causes of action based on violations of the Constitution and Civil Rights Acts.¹⁷² The United States moved to dismiss the action for lack of subject matter jurisdiction. In the alternative, the government argued plaintiffs' actions were barred either because the statutes of limitations had run or because sovereign immunity protected it from suit.¹⁷³ Additionally, the government claimed that the exclusive remedy for claims arising from the internment was the American-Japanese Evacuation Claims Act.¹⁷⁴

The district court granted the government's motion to dismiss, holding that all plaintiffs' claims were barred either by sovereign immunity or the statutes of limitations.¹⁷⁵ In dictum, the court indicated that the appropriate avenue for redress would be through the legislature, especially

170. 584 F. Supp. 1406 (N.D. Cal. 1984).

171. *Hohri v. United States*, 586 F. Supp. 769, 772-73 (D.D.C. 1984), *aff'd in part and rev'd in part*, 782 F.2d 227 (D.C. Cir.), *reh'g en banc denied per curiam*, 793 F.2d 304 (D.C. Cir. 1986), *vacated and remanded*, 107 S. Ct. 2246 (1987) (with instructions to transfer case to the Federal Circuit). The district court postponed class certification pending the outcome of the government's motion to dismiss. If certified as defined, the class would include:

approximately 120,000 citizens and permanent residents, and representatives of such persons no longer living, who were "subjected to forcible segregation, arrest, exclusion, imprisonment, curfew and travel restrictions, deportation, loss of citizenship, or other deprivations of their civil rights and liberties" because of their Japanese ancestry pursuant to actions and orders of the United States.

Hohri, 586 F. Supp. at 772 n.1 (citation omitted).

172. *Id.* at 773, 793.

173. *Id.*

174. *Id.* Approximately 25% of the \$148 million in claims were paid. See P. IRONS, *supra* note 6, at 348. And only 37% of the potential claims were actually filed. *Id.* See *infra* notes 283-89 and accompanying text for a discussion of the American-Japanese Evacuation Claims Act.

175. *Hohri*, 586 F. Supp. at 783, 795. See *supra* note 23 for a list of the constitutional violations alleged in plaintiffs' complaint. The tort causes of action included negligence, intentional law enforcement torts, constitutional violations sounding in tort and civil rights claims. *Id.* at 793. Plaintiffs based the tort causes of action on the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b) (1982). *Hohri*, 586 F. Supp. at 793. The district court held that even if plaintiffs had complied with the FTCA's requirement that all FTCA claims be filed with the appropriate governmental agency before bringing suit in federal court, the FTCA's two year statute of limitations, 28 U.S.C. § 2401(b) (1982), would bar plaintiffs' claims. *Hohri*, 586 F. Supp. at 793. On appeal, the court of appeals affirmed this portion of the district court's ruling. *Hohri v. United States*, 782 F.2d 227, 245-46 (D.C. Cir.), *reh'g en banc denied per curiam*, 793 F.2d 304 (D.C. Cir. 1986), *vacated and remanded*, 107 S. Ct. 2246 (1987) (with instructions to transfer case to the Federal Circuit).

since bills were pending that specifically addressed the problem of compensating World War II internees.¹⁷⁶

1. The court of appeals decision

On appeal, the United States Court of Appeals, District of Columbia Circuit, affirmed in part and reversed and remanded in part.¹⁷⁷ The appellate court affirmed the district court's dismissal of all causes of action, except plaintiffs' fifth amendment takings claim.¹⁷⁸ In their takings claim, plaintiffs alleged that property taken by the government and others during the internment violated their fifth amendment right not to have property taken for public use without just compensation.¹⁷⁹ The appellate court found that the Tucker Act waived the government's sovereign immunity under the takings claim.¹⁸⁰ Thus, said the court, if the government's concealment of the internment's lack of military necessity could be proven, "those individuals who have not received awards under the [American-Japanese Evacuation] Claims Act should be free to press [their takings claim] to its conclusion."¹⁸¹

176. 586 F. Supp. at 795-96. See *infra* notes 290-323 and accompanying text for a discussion of the pending bills.

177. *Hohri*, 782 F.2d at 256 (sitting on the panel were Judges Wright, Ginsburg and Markey (Judges Wright and Ginsburg sat on the D.C. Circuit panel as did Chief Judge Markey of the United States Court of Appeals for the Federal Circuit, sitting by designation)).

178. *Id.* at 244, 255-56.

179. *Hohri*, 586 F. Supp. at 783; 782 F.2d at 242 & n.35. The appellate court held that "the fact that the government forced [the internees] to give up actual possession and control of their property suggests that it has committed a taking *per se*." 782 F.2d at 242 n.35. The fifth amendment provides that no "private property [shall] be taken for public use, without just compensation." U.S. CONST. amend. V. The property allegedly taken without just compensation included not only cameras, weapons, vehicles and radio transmitters, confiscated as "instruments of possible espionage and sabotage," but also bank deposit assets, crops and business property. PERSONAL JUSTICE DENIED, *supra* note 30, at 62; *Hohri*, 586 F. Supp. at 783. Losses also included equity not realized due to the sale of homes and businesses at distress-sale prices, loss of homes and businesses left with caretakers, employees or others not interned who later converted the property to their own use, lost or stolen personal property and loss of business good will. PERSONAL JUSTICE DENIED, *supra* note 30, at 117. See *id.* at 117-33 for a general discussion of the internees' economic losses.

180. *Hohri*, 782 F.2d at 242. The Tucker Act, 28 U.S.C. § 1346(a)(2) (1982), "waives sovereign immunity . . . for those claims founded on . . . provisions of the Constitution that create substantive rights to money damages." 782 F.2d at 242 (citation and footnote omitted). Since the takings clause provides such a substantive right, "there is no question that appellants have stated a claim cognizable under the Takings Clause." *Id.* See *supra* note 19 for a discussion of *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 107 S. Ct. 2378 (1987).

181. 782 F.2d at 256. One problem the court did not address is whether those who filed under the American-Japanese Evacuation Claims Act but did not get *full* compensation should also be allowed to press a takings claim. See *supra* notes 283-89 and accompanying text for a discussion of the American-Japanese Evacuation Claims Act.

Even though the court of appeals found that a viable cause of action may have existed, the statute of limitations problem still remained.¹⁸² The court found, however, that the statute of limitations on the takings claim was effectively tolled until 1980 when it was first revealed that no military necessity for the internment existed.¹⁸³ The court found that because of the Supreme Court's deference to the military's finding of military necessity in the original internment cases,¹⁸⁴ "nothing less than an authoritative statement by one of the political branches, purporting to review the evidence when taken as a whole, could rebut" this deference.¹⁸⁵ Thus, even if the internees had brought an action within the statute of limitations, their claims would have "foundered upon the government's defense that evacuation and internment were required by military necessity."¹⁸⁶ In other words, the internees realistically could not have brought an action until the Court's deference to the War Department's claim of military necessity was rebutted. The court of appeals found that the "authoritative statement" rebutting military necessity was issued in 1980 when Congress passed the Act creating the Commission on Wartime Relocation and Internment of Civilians (CWRIC).¹⁸⁷ The six year statute of limitations for the takings claim was therefore equitably tolled until 1980.¹⁸⁸ Because the *Hohri* case was filed prior to 1986, when the statute of limitations on the takings claim would have run, the takings claim was viable.

2. The denial of an en banc hearing

The government petitioned the court of appeals for a rehearing en banc. In a *per curiam* order, the court denied the petition for rehearing.¹⁸⁹ Circuit Judge Bork wrote a dissenting opinion from the denial of

182. The statute of limitations for a takings claim is six years from the time that the "right of action first accrues." 28 U.S.C. § 2401(a) (1982). At the time *Hohri* was originally filed, approximately 40 years had passed since the alleged taking. 793 F.2d at 304 (Bork, J., dissenting from denial of rehearing en banc).

183. *Hohri*, 782 F.2d at 252-53.

184. *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943).

185. *Hohri*, 782 F.2d at 251.

186. *Hohri*, 586 F. Supp. at 787.

187. *Hohri*, 782 F.2d at 253. The court found that "[a]t a minimum, the Act can be understood to be a formal statement that Congress no longer believed that the explanation provided by the military authorities for the internment program was adequate and that the issue should be reopened." *Id.* See *supra* note 149 for a discussion of the CWRIC.

188. 782 F.2d at 253.

189. *Hohri v. United States*, 793 F.2d 304 (D.C. Cir. 1986) (*per curiam*) (6-5 decision), *vacated and remanded*, 107 S. Ct. 2246 (1987) (with instructions to transfer case to the Federal Circuit).

rehearing en banc with which Circuit Judges Scalia, Starr, Silberman and Buckley joined.¹⁹⁰

The dissent argued that the statute of limitations barred the internees' takings claim since the alleged taking had occurred forty years prior to the filing of their complaint.¹⁹¹ Congress' decision in 1980 expressing its doubt about the military's justification for the internment by passing the Act creating the CWRIC did not toll the statute of limitations.¹⁹² The dissent objected to the panel majority's "contrived reasoning [because it] create[d] a rule of *absolute* and *permanent* judicial deference to any claim of 'military necessity' "¹⁹³ by finding that "nothing less than an authoritative statement by one of the political branches . . . could rebut" the court's deference to military judgment.¹⁹⁴ The dissent feared the majority's decision would result in "unthinking [judicial] acceptance of unsupported [military] assertions."¹⁹⁵ Judge Bork further argued that, contrary to the majority's characterization, *Hirabayashi*¹⁹⁶ and *Korematsu*¹⁹⁷ did not reflect "an absolute deference to military judgment."¹⁹⁸

Furthermore, the dissent asserted that even if an absolute deference to the military's judgment was required, the takings claim could have been brought before the statute of limitations had run, even if the statute of limitations had not been tolled.¹⁹⁹ The dissent's rationale was that since military necessity did not require the taking of property during the war, the takings claim could have been brought at any time after the cause of action had accrued.²⁰⁰ Therefore, under the dissent's reasoning, *concealment* of military necessity would not toll the statute until there was an "authoritative statement," even if, *arguendo*, such a statement was required.²⁰¹ Thus, the dissent found that it was for "the political branches to make whatever reparations they deem appropriate."²⁰²

190. *Id.* Eleven Justices sit on the United States Court of Appeals for the District of Columbia Circuit. *See id.* Five of the eleven Justices dissented. *Id.*

191. *Id.* at 305 (Bork, J., dissenting).

192. *Id.* at 306-07 n.2 (Bork, J., dissenting).

193. *Id.* at 305 (Bork, J., dissenting).

194. *Id.* (Bork, J., dissenting) (quoting *Hohri v. United States*, 782 F.2d 227, 251 (D.C. Cir.), *reh'g en banc denied per curiam*, 793 F.2d 304 (D.C. Cir. 1986), *vacated and remanded*, 107 S. Ct. 2246 (1987) (with instructions to transfer case to the Federal Circuit)).

195. *Id.* at 307 (Bork, J., dissenting).

196. 320 U.S. 81 (1943).

197. 323 U.S. 214 (1944).

198. *Hohri*, 793 F.2d at 305 (Bork, J., dissenting).

199. *Id.* at 308-09 (Bork, J., dissenting).

200. *Id.* (Bork, J., dissenting).

201. *Id.* at 305-06 (Bork, J., dissenting).

202. *Id.* at 313 (Bork, J., dissenting). In essence, the dissent found that the panel majority had "purchased freedom from the statute of limitations at an unacceptable price. A panel

3. The Supreme Court decision

Both the government and plaintiffs petitioned the Supreme Court for certiorari, but only the government's petition was granted.²⁰³ On June 1, 1987, the Supreme Court, without discussing the merits of the case, reversed the District of Columbia Circuit Court of Appeals' decision on a jurisdictional issue.²⁰⁴

The Supreme Court decided the case on the issue of whether the Federal Circuit or the regional court of appeals "has jurisdiction over an appeal from a Federal District Court's decision of a case raising both a nontax claim under the . . . Tucker Act and a claim under the Federal Tort Claims Act (FTCA)."²⁰⁵ The Supreme Court interpreted "ambiguous" statutory language in 28 U.S.C. section 1295(a)(2), which grants the Federal Circuit exclusive appellate jurisdiction over certain cases involving the federal government.²⁰⁶ Based on language variations within that subsection and the "special need for nationwide uniformity" in certain areas of law, such as claims based on the Tucker Act,²⁰⁷ the Supreme Court found that a case which presents both a nontax Tucker Act claim and an FTCA claim may be appealed only to the Federal Circuit.²⁰⁸ The Supreme Court therefore vacated the court of appeals' judgment and remanded the case with instructions to transfer the matter to the Federal

majority that so obviously disapproves of the wartime internment ought to have been more reluctant to create a legal basis for rendering any similar future incident forever unreviewable in any of its consequences." *Id.* at 309 (Bork, J., dissenting). According to the dissent, the majority based its decision primarily on "justice according to morality," not according to law. *Id.* at 313 (Bork, J., dissenting). The dissent cautioned that justice according to morality was not for the courts to administer, but for Congress and the President. *Id.* (Bork, J. dissenting).

The dissent also found that the court lacked jurisdiction to hear the case. *Id.* at 309 (Bork, J., dissenting). Circuit Judge Bork stated that jurisdiction over the takings claim based on the Tucker Act should be appealed to the Federal Circuit, not the regional court of appeals. *Id.* at 309-10 (Bork, J., dissenting). For a thorough discussion of the jurisdictional issue, see *id.* at 309-12 (Bork, J., dissenting); *Hohri*, 782 F.2d at 239-41, *id.* at 257-60 (Markey, C.J., dissenting).

203. *Hohri v. United States*, 107 S. Ct. 454 (1986). The State of California, the State of Hawaii, the ACLU, Americans Friends Service Committee and Fred Korematsu filed amicus curiae briefs on behalf of the Plaintiffs. Telephone interview with Mr. Williams, Supreme Court Clerk (Mar. 4, 1987).

204. *Hohri v. United States*, 107 S. Ct. 2246, 2249 (1987).

205. *Id.* at 2248.

206. *Id.* at 2250-51. The Federal Courts Improvement Act, which created the United States Court of Appeals for the Federal Circuit, was enacted in 1982 to provide nationwide uniformity in certain areas of law. *Id.* at 2251; 28 U.S.C. § 1295 (1982).

207. The Tucker Act includes claims based on contract and claims for money damages "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, . . . or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1346(a)(2) (1982); 107 S. Ct. 2252, n.4.

208. 107 S. Ct. 2253.

Circuit for decision on the government's motion to dismiss plaintiffs' complaint.²⁰⁹

IV. ANALYSIS

A. Introduction

To date, Congress²¹⁰ and the judiciary have not provided adequate compensation to those interned during World War II. The courts have held that sovereign immunity bars claims against the government for almost all constitutional violations arising out of the internment.²¹¹ However, *Hohri v. United States*²¹² may allow the internees to pursue a cause of action against the government. *Hohri* is currently pending before the Federal Circuit. Finally, pending legislation fails in many respects.²¹³ The following section will discuss past and present attempts to compensate the internees and propose both judicial and legislative solutions to the problem.

209. *Id.* One obvious problem with the Court's refusal to treat the issues on the merits is further delay. As recognized by Justice Blackmun, "[t]he issue on the merits probably will be back in this Court once again months or years hence." *Id.* at 2254 (Blackmun, J., concurring). One issue that may again be presented to the Supreme Court is whether the statute of limitations may be equitably tolled on the internees' takings cause of action. See *supra* notes 178-88 and accompanying text. This Comment also proposes that the Supreme Court address whether a cause of action for the non-takings claims can be pursued under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). See *infra* notes 214-82 and accompanying text.

After this Comment was sent to the printer, the Federal Circuit, in a per curiam opinion, affirmed the District Court for the District of Columbia's decision dismissing plaintiffs' claims. *Hohri v. United States*, No. 87-1635 (Fed. Cir. May 11, 1988) (WESTLAW, Allfeds library, 1988 WL 45049). Plaintiffs intend to seek certiorari to the Supreme Court.

210. In 1948, Congress made a vain attempt to compensate the internees for their property losses. American-Japanese Evacuation Claims Act, 50 U.S.C. §§ 1981-1987 (1982). See *supra* notes 283-89 and accompanying text for a discussion of the American-Japanese Evacuation Claims Act. In 1972, the Social Security Act was amended so Japanese Americans, who were over the age of 18 when interned, were credited with having contributed to the Social Security system during detention. 133 CONG. REC. H7579 (daily ed. Sept. 17, 1987) (statement of Rep. McCandless); Social Security Amendments of 1972, Pub. L. No. 92-603, § 231, 86 Stat. 1329, 1367-69 (1972). In 1978, the "Federal civil service retirement provisions were amended . . . to allow Japanese-American civil service retirement credit for the time spent in detention after the age of 18." 133 CONG. REC. H7579 (daily ed. Sept. 17, 1987) (statement of Rep. McCandless); Act of Sept. 22, 1978, Pub. L. No. 95-382, 92 Stat. 727 (1978).

211. *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part and rev'd in part*, 782 F.2d 227 (D.C. Cir.), *reh'g en banc denied per curiam*, 793 F.2d 304 (D.C. Cir. 1986), *vacated and remanded*, 107 S. Ct. 2246 (1987) (with instructions to transfer to the Federal Circuit).

212. *Id.*

213. See *supra* notes 300-23 and accompanying text.

B. Constitutional Claims

1. Non-takings claims

Presently, internees find it difficult to sue the federal government for violation of their constitutional rights arising from the evacuation, relocation and internment. Several factors prevent them from successfully bringing such suits. First, the courts have been unwilling to imply a cause of action against the federal government for its violations of an individual's constitutional rights.²¹⁴ Second, no statutory cause of action exists whereby an individual may bring suit for non-takings constitutional violations against the federal government. Third, even if Congress provided or the courts implied a cause of action, the statute of limitations probably would have run.²¹⁵

a. *implying a cause of action under Bivens v. Six Unknown Named Agents*

In *Hohri v. United States*,²¹⁶ the District of Columbia Circuit Court of Appeals held that claims for violation of non-takings constitutional rights were barred by sovereign immunity because Congress had not chosen to waive sovereign immunity as to those claims.²¹⁷ The judiciary

214. *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part and rev'd in part*, 782 F.2d 227 (D.C. Cir.), *reh'g en banc denied per curiam*, 793 F.2d 304 (D.C. Cir. 1986), *vacated and remanded*, 107 S. Ct. 2246 (1987) (with instructions to transfer to the Federal Circuit).

215. Depending on the outcome of *Hohri*, the statute of limitations may be equitably tolled on the takings issue.

216. 782 F.2d 227 (D.C. Cir.), *reh'g en banc denied per curiam*, 793 F.2d 304 (D.C. Cir. 1986), *vacated and remanded*, 107 S. Ct. 2246 (1987) (with instructions to transfer case to the Federal Circuit).

217. *Id.* at 244. Sovereign immunity bars all claims for violation of constitutional rights under the due process, equal protection, and privileges and immunities clauses of the fifth amendment; the search and seizure clause of the fourth amendment; the cruel and unusual punishment clause of the eighth amendment; the rights to fair trial and counsel under the sixth amendment; the press, speech, religion, petition and assembly clauses of the first amendment; the prohibition of bills of attainder and ex post facto laws and the right to the writ of habeas corpus under article I, section 9; and the protection from involuntary servitude under the thirteenth amendment. *Id.* That the internees' constitutional rights were violated was not disputed. *See id.* at 256 (Markey, C.J., dissenting) (no one involved in the *Hohri* case disputed that those of Japanese ancestry were wronged); Proclamation No. 4417, 3 C.F.R. 8 (1977) (President Ford stated that the evacuation was a national mistake and wrong); H.R. 442, 100th Cong., 1st Sess. § 3 (1987) (recognized that constitutional rights were violated).

The Tucker Act waives sovereign immunity for claims founded on statutes, regulations, contracts or the Constitution which create substantive rights to money damages. *Hohri*, 782 F.2d at 242 (citing *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983)). But see *supra* note 19 for a discussion of the effect of a recent Supreme Court case holding that statutory recognition is not necessary for a takings cause of action.

could, however, imply a cause of action for the constitutional violations the internees suffered.²¹⁸ In *Bivens v. Six Unknown Named Agents*,²¹⁹ the Supreme Court implied a cause of action for damages against agents of the Federal Bureau of Narcotics for violation of the plaintiff's fourth amendment rights,²²⁰ even though no statute or constitutional provision expressly permitted a cause of action.²²¹ In *Bivens*, federal agents entered and searched plaintiff's home for narcotics without a search warrant or probable cause. The agents handcuffed plaintiff in his wife and children's presence, and threatened to arrest plaintiff's family. Plaintiff was subsequently taken from his home, interrogated, booked and visually strip searched.²²²

The *Bivens* Court implied a private cause of action for violation of plaintiff's constitutional rights for two reasons. First, it distinguished power wielded by federal officials from that held by individuals. Because a federal official possesses significantly greater authority, he has a "greater capacity [to cause] harm."²²³ For this reason, the Court rejected the government's argument that the fourth amendment serves merely as a limitation on federal defenses to a state law claim.²²⁴ *Bivens* instead held that the Constitution is "an independent limitation upon the exercise of federal power" by federal officials.²²⁵

If the Constitution is such an "independent limitation" on federal power, the Constitution should also limit the federal government's exercise of that power. The government's authority to intern those of Japa-

218. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

219. *Id.*

220. *Id.* at 390-91. The fourth amendment provides that:

The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

221. *Bivens*, 403 U.S. at 396-97.

222. *Id.* at 389.

223. *Id.* at 392.

224. *Id.* at 394. See *infra* note 225.

225. *Bivens*, 403 U.S. at 394. The government argued that the right of privacy was a creation of state and not federal law. *Id.* at 390. Thus the government's argument was that the action should have been brought in state court under state tort law. *Id.* If the federal agents had acted unconstitutionally, then, they could not defend their actions by asserting that they had validly exercised federal power. *Id.* at 390-91. They would be stripped of their "official" capacity and stand before the law as private individuals. *Id.* at 391. If this was correct, the "relationship between a citizen and a federal agent unconstitutionally exercising his authority [would be] no different from the relationship between two private citizens." *Id.* at 391-92. The Court rejected this argument because of the difference in power held by a government official relative to a private individual. *Id.* at 392.

nese ancestry under its war powers was at the time unquestioned, and the resulting harm was enormous.²²⁶ As in *Bivens*, this inordinate power should be limited by allowing a cause of action. The Constitution "guarantees to citizens . . . the absolute right to be free from [constitutional violations] carried out by virtue of federal authority."²²⁷ Where the wrong is monumental and affects many, a remedy limited to individual officials is meaningless. Here, the officials responsible for the internment are deceased. And even if alive, a judgment against an official would not be an effective remedy since the official would not have the monetary resources to compensate all those injured. To have an effective cause of action, then, the internees must be able to sue the government itself. As the Court held in *Bell v. Hood*,²²⁸ a cause of action should be implied because a right without a remedy is no right at all.²²⁹

In addition, the *Bivens* Court reasoned that under the circumstances, equity justified implying a cause of action.²³⁰ The *Bivens* Court implied a cause of action from the fourth amendment because no adequate remedy would otherwise be available to an individual where federal officials under claim of authority violated fourth amendment rights.²³¹ The Court was concerned that a person could be faced with the anomalous situation of being convicted of resisting arrest and yet not having a cause of action if the arrest was unlawful.²³² Unless the wrongfully ar-

226. See *supra* notes 81-88 and accompanying text.

227. *Bivens*, 403 U.S. at 392.

228. 327 U.S. 678 (1946).

229. See *id.* at 684-85.

[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Id. at 684.

230. *Bivens*, 403 U.S. at 394-95.

231. *Id.* The *Bivens* equity rationale has since been extended to other Constitutional provisions. *Carlson v. Green*, 446 U.S. 14, 17-18 (1980) (eighth amendment); *Davis v. Passman*, 442 U.S. 228, 230 (1979) (fifth amendment); *Dellums v. Powell*, 566 F.2d 167, 194-96 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 916 (1978) (first amendment); *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975); *Paton v. LaPrade*, 524 F.2d 862, 869-70 (3d Cir. 1975); *Yiamouyiannis v. Chemical Abstracts Serv.*, 521 F.2d 1392, 1393 (6th Cir. 1975), *cert. denied*, 439 U.S. 983 (1978) (sixth amendment); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 161-62 (D.D.C. 1976) (right to counsel). Note, *Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U. L. REV. 597, 598 n.7 (1982).

232. *Bivens*, 403 U.S. at 394-95.

The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. . . .

"In such cases there is no safety for the citizen, except in the protection of the judi-

rested person was able to assert a cause of action, there would be "no safety for the citizen."²³³

Similarly, when the government takes away constitutional rights by asserting its war powers, there is little a person can do to protect himself. For example, during World War II, those of Japanese ancestry were forced to either comply with the government's orders or assert their constitutional rights through the judicial system.²³⁴ However, the courts barred them from successfully adjudicating their actions.²³⁵ Like the plaintiff in *Bivens*, "[t]here remain[ed] . . . but the alternative of resistance, which . . . amount[ed] to [a] crime."²³⁶ The *Bivens* equity argument is equally applicable to the internment cases because no adequate remedy exists unless the judiciary implies a cause of action.²³⁷ Because of the enormity of the wrong and the large number of people injured, the only effective remedy is against the government itself. Thus, under *Bivens*' equity argument, the internees should be entitled to seek relief from the federal government for its violation of their constitutional rights.

i. special factors counselling hesitation

Once the *Bivens* Court found that a cause of action could be implied, the essential issue was whether plaintiff could redress his injury through damages.²³⁸ Citing *Marbury v. Madison*,²³⁹ the *Bivens* Court held that a plaintiff is entitled to money damages when his constitutional rights are violated.²⁴⁰ The internees should be entitled to damages because, like *Bivens*, their constitutional rights were violated.²⁴¹

cial tribunals. . . . There remains to him but the alternative of resistance, which may amount to crime."

Id. (citations omitted).

233. *Id.* at 394.

234. See *supra* notes 137-47 and accompanying text.

235. See *supra* notes 137-47 and accompanying text.

236. *Bivens*, 403 U.S. at 395.

237. As previously discussed, *Hohri* may allow a takings cause of action. However, takings claims and claims under the American-Japanese Evacuation Claims Act only provide compensation for loss of real and personal property. See *supra* notes 283-89 and accompanying text.

Congress may soon provide a remedy. Bills are presently pending before the 100th Congress which would redress the violations suffered by the internees. See *supra* notes 290-99 and accompanying text.

238. *Bivens*, 403 U.S. at 395.

239. 5 U.S. (1 Cranch) 137 (1803).

240. *Bivens*, 403 U.S. at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*

241. Equitable relief would obviously not be an appropriate remedy here since no one remains interned or subject to exclusion orders. Once the alleged unconstitutional act has been terminated, the only logical relief is money damages. Where equitable relief would be unavail-

However, before the *Bivens* Court allowed a damage remedy, it looked to see whether the case "involve[d] . . . special factors counselling hesitation in the absence of affirmative action by Congress."²⁴² These special factors may include: concern for depletion of the federal purse,²⁴³ separation of powers,²⁴⁴ overburdening the judicial system²⁴⁵ and sovereign immunity.²⁴⁶ In *Carlson v. Green*,²⁴⁷ the Court pinpointed an additional "special factor." *Carlson* interpreted *Bivens*' "special factors counselling hesitation" to require an analysis of whether defendants "enjoy[ed] such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate."²⁴⁸ An analysis of the above "special factors" is necessary to determine whether the judiciary could justifiably imply a cause of action for damages against the federal government for its violation of the internees' constitutional rights during World War II.

Although the *Bivens* Court was willing to allow damages against *federal officials* for violation of constitutional rights, the courts might not be willing to create such a cause of action for damages against the *federal government*. In *Hohri*,²⁴⁹ the district court refused to imply a cause of

ing, it may come down to being a matter of "damages or nothing." *Davis v. Passman*, 442 U.S. 228, 245 (1979) (quoting *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)).

242. *Bivens*, 403 U.S. at 396.

243. *Id.* "Congress [is] normally quite solicitous where the federal purse [is] involved" *Id.*

244. *Id.* (Black, J., dissenting). "The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States." *Id.* at 429 (Black, J., dissenting).

245. *Id.* at 428 (Black, J., dissenting). "The courts . . . are choked with lawsuits. . . . The number of cases . . . have reached an unprecedented volume in recent years." *Id.* at 428 (Black, J., dissenting).

246. *Id.* at 410 (Harlan, J., concurring). The sovereign immunity factor will be discussed in the following section of this Comment. See *infra* notes 267-74 and accompanying text.

247. 446 U.S. 14 (1980). *Carlson* involved a suit brought by the administratrix of the estate of a federal prisoner against the Federal Bureau of Prisons alleging violation of decedent's due process and equal protection and eighth amendment right against the infliction of cruel and unusual punishment. *Id.* at 16. The complaint alleged that defendants were fully aware of the inadequacies of their medical facilities and staff at the Federal Correction Center in Terre Haute, Indiana, and of the seriousness of decedent's chronic asthmatic condition. Nonetheless, they kept him at the facility against the advice of doctors, failed to give him competent medical attention, administered contraindicated drugs, attempted to use a respirator known to be inoperative and delayed too long in transferring the prisoner to an outside hospital. The complaint further alleged that this lack of attention was due in part to racial prejudice. *Id.* at 16 n.1.

248. *Id.* at 19. In other words, to effectively perform his duties, should the defendant/official be protected from liability for constitutional violations he may cause through the scope of his employment?

249. 586 F. Supp. at 783. See *supra* note 175 and accompanying text. The court held that

action for damages against the federal government relying on the rationale in *Bivens*.²⁵⁰ The district court cited *Bivens*' special factors counselling hesitation as the reason for denial.²⁵¹ The district court in *Hohri* relied on Congress' interest in maintaining control over the public fisc as the special factor counselling hesitation.²⁵² This concern could be overcome by allowing the court to issue its judgment, but leaving Congress to appropriate the funds necessary to satisfy the judgment. The court would therefore not be intruding on Congress' control over the public fisc.

Bivens presents yet another separation of powers argument to deny relief.²⁵³ In his dissent in *Bivens*, Chief Justice Burger stated that the judiciary should not:

create[] a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.²⁵⁴

Although Chief Justice Burger recognized the need for a remedy against

although the takings claim was a viable constitutional claim, it was barred by the statute of limitations. *Id.* at 783, 786.

250. *Id.* at 782-83. The *Hohri* court later relied on the separation of powers argument to refute plaintiffs' equitable argument that the internees have not been adequately compensated. *Id.* at 795-96.

Bills are now before Congress that would implement some or all of [the] recommendations [of the CWRIC]. The careful spadework which plaintiffs have done in the prosecution of their claims in court should contribute to making their argument to Congress more persuasive. And it may be that Congress will focus more closely on these claims once plaintiffs have exhausted their possible judicial remedies.

Id. The Court of Appeals for the District of Columbia Circuit, in both the appeal of the district court decision and the denial of an en banc hearing, did not discuss the *Bivens* argument. *Hohri*, 782 F.2d 227; 793 F.2d 304.

251. *Hohri*, 586 F. Supp. at 783.

252. *Id.* See also *supra* note 250.

253. To avoid a separation of powers problem, see *supra* text following note 252. Congress might in theory refuse to appropriate the funds, but the decision would belong to Congress.

The Court used a similar theory when it issued orders against President Nixon to deliver certain subpoenaed tape recordings and documents to the district court in *United States v. Nixon*, 418 U.S. 683 (1974). The Court issued the order even though it was not clear whether it would be able to enforce its order through its contempt power; a contempt order issued against a sitting President would usurp Congress' impeachment powers, therefore creating a separation of powers problem.

254. *Bivens*, 403 U.S. at 411-12 (Burger, C.J., dissenting).

unconstitutional conduct by government officials,²⁵⁵ he concluded that it was beyond judicial power to effect such a remedy.²⁵⁶ Similarly, the district court in *Hohri* concluded that it is not the judiciary's role to create a cause of action for damages in the internment cases.²⁵⁷ However, one role of the courts is to encourage congressional action when Congress acts slowly or not at all.²⁵⁸ In a case such as the internment, where Congress has failed to provide adequate reparations for over forty years, it is certainly time for the courts to intervene.

Another special factor is concern for overburdening the judicial system.²⁵⁹ This factor was not even considered as an argument against creating a cause of action for damages against federal officials in *Bivens*. It likewise should not be considered as an argument against implying a cause of action for damages against the federal government in the internment cases. In the internment cases, it was the federal government that impinged on individuals' constitutional rights, and no danger exists that the court will be deluged with similar cases.

In *Bivens*, Justice Black stated in his dissent that even if the Court had the power to create a remedy,²⁶⁰ it should refrain from doing so because it would increase congestion in the judicial system.²⁶¹ But to deny a remedy on this basis is specious; the courts exist for the very purpose of adjudicating wrongs. A light court docket should not be accorded greater importance than a person's constitutional rights.

The view that the judiciary will be overburdened by implying causes of action in the Constitution has been criticized. For example, in *Davis v. Passman*,²⁶² the Court implied a cause of action from the fifth amend-

255. *Id.* at 415 (Burger, C.J., dissenting). "Without some effective sanction, [constitutional guarantees against unlawful conduct] . . . would constitute little more than rhetoric." *Id.* (Burger, C.J., dissenting). Burger suggested a statutory scheme providing for, inter alia, a waiver of sovereign immunity for illegal acts committed in the performance of an official's duties, the creation of a cause of action for damages for violation of fourth amendment rights and the creation of a quasi-judicial tribunal to adjudicate the claims. *Id.* at 422-23 (Burger, C.J., dissenting). The Chief Justice relied on the doctrine of respondeat superior as the basis for this remedy. *Id.* at 422 (Burger, C.J., dissenting).

256. *Id.* at 422 (Burger, C.J., dissenting).

257. 586 F. Supp. at 783.

258. See *infra* notes 348-52 and accompanying text.

259. *Bivens*, 403 U.S. at 428 (Black, J., dissenting).

260. *Id.* at 429-30. (Black, J., dissenting). "The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States. . . . [T]he business of the judiciary is to interpret the laws and not to make them." *Id.* (Black, J., dissenting). See also *id.* at 430 (Blackmun, J., dissenting).

261. *Id.* at 428-29 (Black, J., dissenting). See also *id.* at 430 (Blackmun, J., dissenting).

262. 442 U.S. 228 (1979).

ment²⁶³ against Congressman Passman for sex discrimination, despite the court of appeals' concern that the courts would be deluged with claims.²⁶⁴ The *Davis* Court did not "perceive the potential for . . . a deluge" on the federal courts if a damage remedy was made available.²⁶⁵ In answer to the court of appeals' concerns, the *Davis* Court cited Justice Harlan's concurrence in *Bivens*:

"Judicial resources . . . are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles."²⁶⁶

Thus, concern for overburdening the judicial system is an insufficient reason for refusing to imply a cause of action for damages in the internment cases.

The doctrine of sovereign immunity provides yet another argument against allowing damages from the federal government.²⁶⁷ The *Bivens* Court specifically avoided passing on the question of official immunity.²⁶⁸ Additionally, the *Hohri* district court found that "there being no affirmative action by Congress . . ., the doctrine of sovereign immunity [stood] as a bar" to plaintiffs' cause of action for damages.²⁶⁹

However, the doctrine of sovereign immunity has been criticized.²⁷⁰ Specifically, in *Bivens*, Justice Harlan stated in dicta that "at the very least . . . a remedy would be available for the most flagrant and patently

263. *Davis*, 442 U.S. at 248-49. The fifth amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V.

264. See *Davis v. Passman*, 571 F.2d 793, 800 (1978), *rev'd* 442 U.S. 228 (1979); *Davis*, 442 U.S. at 248.

265. *Davis*, 442 U.S. at 248.

266. See *id.* (quoting *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring)). See also Note, *supra* note 231, at 654-57. "[T]o immunize the unconstitutional acts of the government in order to limit the judiciary's workload is to devalue the Constitution and the tradition of judicial review." *Id.* at 656.

267. The doctrine of sovereign immunity provides that the sovereign power cannot be sued, except by its own consent. Comment, *Sovereign Immunity: A Battleground of Competing Considerations*, 12 SW. U.L. REV. 457 (1981).

268. *Bivens*, 403 U.S. at 397.

269. *Hohri*, 586 F. Supp. at 783.

270. See *Bivens*, 403 U.S. at 411 (Harlan, J., concurring); *id.* at 420 (Burger, C.J., dissenting). See also Note, *supra* note 231, at 598 & n.9, 601 & n.16; Comment, *supra* note 267, at 457-58.

unjustified sorts of . . . conduct," despite the immunity defense.²⁷¹ Justice Harlan indicated that the policy reason behind this was that "it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances."²⁷² Thus, it could effectively be argued that sovereign immunity is an outdated doctrine that should no longer be followed if the protections provided by this nation's Constitution are to be "little more than rhetoric."²⁷³ As stated by Chief Justice Burger in his *Bivens* dissent, "we can and should be faulted for clinging to an unworkable and irrational concept of law."²⁷⁴

Where the government is found, then, to have acted unconstitutionally under the guise of necessity²⁷⁵ and where the justification for its actions is later proven to have been contrived, equity requires that a cause of action be implied from the Constitution.²⁷⁶ The internment cases are an especially cogent example of an instance where a cause of action for damages for constitutional violations, not specifically provided for in the Constitution or by federal statute, should be implied despite the government's sovereign immunity defense.

271. *Bivens*, 403 U.S. at 411 (Harlan, J., concurring).

272. *Id.* (Harlan, J., concurring); see also *Davis*, 442 U.S. at 242.

[I]n the absence of a "textually demonstrable constitutional comment of [an] issue to a coordinate political department," we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

Davis, 442 U.S. at 242 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

273. *Bivens*, 403 U.S. at 415 (Burger, C.J., dissenting). See also Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L. F. 919 (discussing abrogation of common law sovereign immunity for torts at the state level).

274. *Bivens*, 403 U.S. at 420 (Burger, C.J., dissenting) (referring to the suppression doctrine, but equally applicable to the doctrine of sovereign immunity); see also *id.* (Burger, C.J., dissenting) (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Id. (Burger, C.J., dissenting) (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

275. The courts are more likely to defer to another branch's judgment regarding military necessity during times of war when determining whether constitutional rights have been violated. See *supra* notes 137-47 and accompanying text.

276. "[T]he government must 'play the game fairly' and cannot be allowed to profit from its own illegal acts." *Bivens*, 403 U.S. at 414 (Burger, C.J., dissenting) (referring to the suppression doctrine, but equally applicable to sovereign immunity (quoting *Olmstead v. United States*, 227 U.S. 438, 469, 471 (1928) (dissenting opinions))).

Independent status is the final argument against implying a cause of action for damages. This argument involves the Court's unwillingness to imply a cause of action for a constitutional violation if it would "inhibit . . . efforts to perform . . . official duties."²⁷⁷ The judiciary could find that the federal government, unlike an official, enjoys such independent status, especially during times of national crisis when the government is often required to act quickly. If the government could be held liable for constitutional violations arising from such actions, it might be hindered from effectively performing its duties. The government, then, would argue that its need for independent status should protect it from liability. The government would contend that it should be free to act quickly, especially during times of national crisis, without concern for liability for implied constitutional violations. However, the government's independent status would not be hindered if it is liable only for those constitutional violations in which it acted unreasonably. The government's actions would be curtailed only to the extent that it would have to consider whether its motives for acting were pure before proceeding. Liability, then, would only be imposed where, as in the internment, the government deprives an individual of constitutional rights based on impure motives, such as racial prejudice. Therefore, the government's independence would not be restricted significantly.

The *Bivens* Court's special factors should not prevent the judiciary from implying a cause of action for damages on behalf of the internees against the federal government. Sovereign immunity is outdated²⁷⁸ and the argument for preservation of judicial resources is not valid.²⁷⁹ Furthermore, even if a cause of action is implied, Congress' interest in controlling the federal fisc can be maintained²⁸⁰ and the government's independent status not curtailed.²⁸¹ Also, the separation of powers factor is not an effective argument where, as here, Congress has failed to remedy constitutional violations which occurred over forty years ago.²⁸²

C. Past and Present Legislative Remedies

1. The American-Japanese Evacuation Claims Act

The American-Japanese Evacuation Claims Act, enacted in 1948,²⁸³

277. *Carlson v. Green*, 446 U.S. 14, 19 (1980).

278. See *supra* notes 267-74 and accompanying text.

279. See *supra* notes 259-66 and accompanying text.

280. See *supra* notes 249-52 and accompanying text.

281. See *supra* note 277 and accompanying text.

282. See *supra* notes 253-58 and accompanying text.

283. 50 U.S.C. §§ 1981-1987 (1982).

was the United States' only official attempt to date to provide compensation for the internees' property losses.²⁸⁴ Because the Act was poorly designed, it did not provide sufficient compensation.²⁸⁵ First, the Act gave the Attorney General jurisdiction to "compromise and settle and make an award in an amount not to exceed \$100,000 . . . when such claim . . . for damage to or loss of real or personal property . . . [was] a reasonable and natural consequence of the evacuation or exclusion of such person"²⁸⁶ Second, the Act could compensate only for property losses that could be proved by records.²⁸⁷ Lastly, once a claim had been paid under the Act, the claimant waived his right to make any further claims arising out of the evacuation against the United States, its officers, agents, servants and employees.²⁸⁸ Because of these constraints, internees were often drastically undercompensated, if they were compensated at all.²⁸⁹

2. Proposed legislation

Presently two bills concerning reparations for the internment are before Congress: Senate Bill S. 1009 and House Bill H.R. 442.²⁹⁰ They

284. See 133 CONG. REC. H7579 (daily ed. Sept. 17, 1987) (statement of Rep. McCandless).

285. See *supra* note 131 for a discussion of the Act's inadequate compensation.

286. 50 U.S.C. § 1981(a) (1982).

287. P. IRONS, *supra* note 6, at 348; 50 U.S.C. § 1983(b) (1982). Obtaining the necessary records was "an impossible task for most potential claimants." P. IRONS, *supra* note 6, at 348. The Act provided \$37 million in compensation from claims filed totaling \$148 million. PERSONAL JUSTICE DENIED, *supra* note 30, at 118; P. IRONS, *supra* note 6, at 348. The Federal Reserve Bank estimated that Japanese Americans lost \$400 million in property due to the internment. P. IRONS, *supra* note 6, at 348. The Act did not cover loss of earnings and profits from businesses and farms sold under the hurried conditions prior to evacuation or the loss of constitutional rights. *Id.*

288. 50 U.S.C. § 1984(d) (1982).

289. See *supra* note 287. The Commission estimated that based on 1945 dollars, the internees lost between \$108 and \$164 million in income and between \$41 and \$206 million in property. *Id.* In 1983 dollars, the losses are between \$810 million and \$2 billion. *Id.*

290. The House passed H.R. 442 on September 17, 1987 by a vote of 243 to 141. 133 CONG. REC. H7595 (daily ed. Sept. 17, 1987). Senate Bill 1009 was reported out of the Committee on Governmental Affairs on October 20, 1987, but has not been debated on the floor. S. REP. NO. 202, 100th Cong., 1st Sess. (1987). As of September 1987, S. 1009 had 75 co-sponsors out of the 51 votes needed to pass. Cloud, *House Votes to Make Amends for World War II Internment*, 45 CONG. Q. 2246 (1987); Letter from Grayce Uyehara, Executive Director of the Japanese American Citizens League Legislative Education Committee (JACL-LEC) to Barbara Tang (Oct. 14, 1986) (discussing reparations legislation) (on file at Loyola of Los Angeles Law Review Office) [hereinafter Uyehara Letter]. On April 20, 1988, after this Comment was sent to the printer, the Senate passed S. 1009. H.R. 442 and S. 1009 will now go to joint conference for resolution.

The bills are supported by both the JACL-LEC and the National Coalition for Redress/Reparations (NCRR). Uyehara Letter, *supra*; NCRR Banner 1 (Sept. 1986) [hereinafter NCRR Banner]. The NCRR is a grassroots coalition composed of Japanese Americans and

essentially parallel each other, and were proposed to accept and implement the CWRIC's recommendations.²⁹¹ The purposes of the bills are to publicly apologize for the internment, recognize that the internment was fundamentally unjust and provide monetary redress to those who were actually interned.²⁹² The bills also provide for an education fund to inform the public about the internment²⁹³ and to establish a board responsible for making disbursements from the fund.²⁹⁴ The bill would

others. *Hearings on S. 2116*, *supra* note 90, at 106 (testimony of NCRR) (Senate Bill 2116, 98th Congress, 2d session, was the 1984 version of Senate Bill 1009). The NCRR's purpose is to organize and develop community efforts to win reparations for the internees. *Id.* The JACL-LEC is part of a Japanese American citizen's league. *See* Uyehara Letter, *supra*. One purpose of the Legislative Education Committee (LEC) is to support passage of H.R. 442 and S. 1009. *See id.* Both the JACL-LEC and the NCRR pushed for passage of the bills during the 100th Congress. *Id.*; *see* NCRR Banner at 1-2. The JACL-LEC has stated that it is firmly "against any amendments that would delete the individual payment." Uyehara Letter, *supra*; *see infra* note 296 and accompanying text for a discussion of the proposed individual payment.

291. The Senate Bill and House Bills are similar. *See* Appendix I and II.

The major differences between H.R. 442 and S. 1009 are:

(1) S. 1009 discusses and provides for reparations to the Aleuts who were evacuated from the Pribilofs and Aleutian chain islands during World War II. S. REP. NO. 202, 100th Cong., 1st Sess. 2 (1987);

(2) S. 1009 provides for a \$1.3 billion fund, rather than H.R. 442's \$1.25 billion fund. H.R. 442, 100th Cong., 1st Sess. § 6(e) (1987); S. 1009, 100th Cong., 1st Sess. § 204(b) (1987);

(3) S. 1009 provides that claims would be extinguished against the United States 10 years after the bill becomes law, or when an eligible person receives total payment. S. 1009, 100th Cong., 1st Sess. § 205(e) (1987). H.R. 442 provides that payment is in full settlement of any claim against the United States arising out of the internment. An eligible individual must affirmatively refuse payment within six months of notice of eligibility or have his claims against the United States extinguished. H.R. 442, 100th Cong., 1st Sess. § 7(a)(3) (1987).

292. The House bill's stated purpose is to:

(1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;

(2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens;

(3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event;

(4) make restitution to those individuals of Japanese ancestry who were interned;

(5) discourage the occurrence of similar injustices and violations of civil liberties in the future; and

(6) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.

H.R. 442, 100th Cong., 1st Sess. § 2 (1987). *See also* S. 1009, 100th Cong., 1st Sess. § 1(b) (1987).

293. H.R. 442, 100th Cong., 1st Sess. § 2(3) (1987); S. 1009, 100th Cong., 1st Sess. § 1(b)(3) (1987).

294. *Id.* at § 8(a). The President, with the advice and consent of the Senate, would appoint a board consisting of nine members to carry out the bill's purposes. *Id.* at § 8(c)(1). Senate Bill 1009 provides that at least five members must be of Japanese ancestry. S. 1009, 100th Cong., 1st Sess. § 206(c) (1987). No such provision is found in the House bill. *See* Appendix I. No board member could be a governmental officer or employee. H.R. 442, 100th Cong., 1st

establish a \$1.25 billion fund²⁹⁵ out of which a restitution payment of \$20,000 per internee living at date of enactment would be provided, with the oldest internees receiving compensation first.²⁹⁶

The government would have the burden to use records already in its possession to locate internees and distribute funds to them.²⁹⁷ The Attorney General would be required to review criminal convictions for violations under evacuation, relocation and internment laws or military orders.²⁹⁸ Under the Act, the Attorney General would then request that the President offer pardons to any individual the Attorney General

Sess. § 8(c)(1) (1987); S. 1009, 100th Cong., 1st Sess. § 206(c) (1987). The board would terminate not later than 90 days after the \$1.25 billion fund, including any income earned on the fund, was expended or 10 years after the bill's enactment, whichever was earlier. H.R. 442, 100th Cong., 1st Sess. §§ 6(d), 8(h) (1987); S. 1009, 100th Cong., 1st Sess. § 206(h) (1987).

295. H.R. 442, 100th Cong., 1st Sess. § 6(e) (1987). S. 1009 provides for a \$1.3 billion fund. S. 1009, 100th Cong., 1st Sess. § 204(b) (1987). Approximately 60,000 internees are still living. RECOMMENDATIONS, REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1983). An individual may refuse payment, but such refusal would bar receipt of any future payment under the bill. H.R. 442, 100th Cong., 1st Sess. § 7(a)(2) (1987); S. 1009, 100th Cong., 1st Sess. § 205(a)(2) (1987). Any amount refused would remain in the fund. H.R. 442, 100th Cong., 1st Sess. § 7(a)(2) (1987); S. 1009, 100th Cong., 1st Sess. § 205(a)(2) (1987). Payment of the \$20,000 reparations to an individual would be in full settlement of all claims against the United States arising out of the internment. H.R. 442, 100th Cong., 1st Sess. §§ 7(a)(3), 10(2)(B) (1987); *see* S. 1009, 100th Cong., 1st Sess. § 205(e) (1987). The reparations payment would not be included in income for tax purposes. H.R. 442, 100th Cong., 1st Sess. § 7(g) (1987); S. 1009, 100th Cong., 1st Sess. § 205(f)(1) (1987). The fund may only be used:

(1) to sponsor research and public educational activities [about the internment], and to publish the hearings and findings of the Commission, so that the events surrounding the evacuation, relocation, and internment of the United States citizens and permanent resident aliens of Japanese ancestry will be remembered, and so that the causes and circumstances of this and similar events may be illuminated and understood; and (2) for reasonable administrative expenses of the Board

H.R. 442, 100th Cong., 1st Sess. § 8(b) (1987); *see also* S. 1009, 100th Cong., 1st Sess. § 206(b) (1987).

296. H.R. 442, 100th Cong., 1st Sess. §§ 7(a)(1), (b) & 10(2) (1987). The Attorney General must identify and locate eligible individuals within nine months after enactment. *Id.* at § 7(a)(1). If an eligible individual has not received payment or been notified of eligibility by September 30, 1989, then that person may notify and provide documentation of eligibility to the Attorney General. *Id.* at § 7(d).

297. *Id.* at § 7(a)(1). Costs incurred in carrying out the Attorney General's duties would not be paid out of the fund. H.R. 442, 100th Cong., 1st Sess. § 7(e) (1987). Senate Bill 1009 differs from House Bill 442 because the Senate Bill directs the Attorney General to "encourage each eligible individual to submit his current address to the Department of Justice through a public awareness campaign." S. 1009, 100th Cong., 1st Sess. § 205(a) (1987). However, the Attorney General would also be required to locate each eligible individual using records already in the federal government's possession. *Id.* But *see* H.R. 442, 100th Cong., 1st Sess. § 7(c) (1987).

298. H.R. 442, 100th Cong., 1st Sess. § 4(a)(1)-(3) (1987); S. 1009, 100th Cong., 1st Sess. § 202(a) (1987).

recommends.²⁹⁹

*a. major criticisms of and suggestions for amendments
to the present bills*

A problem unique to the Senate Bill is that it does not indicate whether the remedies provided are to be exclusive of any other potential remedies the internees may have against the government. This is significant because, based on pending litigation,³⁰⁰ the internees may be allowed to pursue a class action suit against the government for constitutional violations due to the internment.³⁰¹ Therefore, it needs to be clarified whether, under the Senate Bill's provisions, an internee could accept the \$20,000 reparation and still be included as a member of the *Hohri* class.³⁰² Since the bill provides that once an eligible individual refuses payment, he has forever waived his entitlement,³⁰³ an internee might have to choose between accepting a reparation payment or being a member of the *Hohri* class.³⁰⁴

Related to this, Congress should clarify exactly what harms the \$20,000 restitution payment compensates. Although the bills list findings and/or purposes, they do not clearly state what injuries the \$20,000 payment redresses.³⁰⁵ The bills merely state that the purpose of the payment is to "make restitution to those individuals of Japanese ancestry who were interned."³⁰⁶ The bills should be re-drafted to make clear whether the restitution includes payment for property losses, as well as

299. H.R. 442, 100th Cong., 1st Sess. § 4(b)-(c) (1987); S. 1009, 100th Cong., 1st Sess. § 202(b)-(c) (1987).

300. *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part and rev'd in part*, 782 F.2d 227 (D.C. Cir.), *reh'g en banc denied per curiam*, 793 F.2d 304 (D.C. Cir. 1986), *vacated and remanded*, 107 S. Ct. 2246 (1987) (with instructions to transfer to the Federal Circuit).

301. *Hohri*, 782 F.2d at 256.

302. H.R. 442 § 7(a)(3) provides: "The payment to an eligible individual under this section shall be in full satisfaction of any claim of such individual against the United States arising out of acts done to that individual that are described in section 10(2)(B)." H.R. 442, 100th Cong., 1st Sess. § 7(a)(3) (1987). H.R. 442 § 7(a)(3) also provides that a person who "does not refuse to accept" payment within six months after receiving notice of eligibility is precluded from asserting claims arising out of the internment against the United States. *Id.*

303. S. 1009, 100th Cong., 1st Sess. § 205(a)(2) (1987).

304. According to *Hohri*, the statute of limitations on the internees' takings claim began to run in 1980. *Hohri*, 782 F.2d at 253. Therefore, if an internee is not included in the *Hohri* class, and he did not file an action before 1986, his takings claim would be barred by the running of the six year statute of limitations.

305. H.R. 442, 100th Cong., 1st Sess. § 2 (1987); S. 1009, 100th Cong., 1st Sess. § 1(b) (1987).

306. H.R. 442, 100th Cong., 1st Sess. § 2(4) (1987); S. 1009, 100th Cong., 1st Sess. § 1(b)(4) (1987).

for violation of individual rights.³⁰⁷ This clarification could be important for determining whether a person has already been compensated for property losses and therefore possibly excluded from *Hohri* class membership.³⁰⁸ Also, clarification could be important as precedent in favor of compensation for future governmental violations of an individual's constitutional rights.³⁰⁹

Another problem with the bills is that no mechanism ensures that the Attorney General will be fair in his recommendations to the President for pardons of criminal convictions arising out of the evacuation, relocation and internment.³¹⁰ Similarly, no mechanism ensures that federal departments and agencies will fairly review an internee's application

307. To clarify this, Congress could re-draft the bill to parallel § 1(b)(5) of Senate Bill 1009 which lists the reasons behind restitution to the Aleuts.

(b) PURPOSES.—*The purposes of this Act are to—*

.....
(5) *make restitution to Aleut residents . . . in settlement of United States obligations in equity and at law, for—*

(A) *injustices suffered and unreasonable hardships endured while under United States control during World War II;*

(B) *personal property taken or destroyed by United States forces during World War II;*

(C) *community property, including community church property, taken or destroyed by United States forces during World War II; and*

(D) *traditional village lands on Attu Island not rehabilitated after World War II for Aleut occupation or other productive use.*

S. 1009, 100th Cong., 1st Sess. § 1(b)(5) (1987).

308. If the Supreme Court ultimately determines that the internees may bring a cause of action against the government only for takings violations, then the district court may narrow the *Hohri* class membership to those internees that have not been compensated for property losses under the Civil Liberties Act of 1987. It is therefore important for the bills to specify precisely what is being compensated. The legislative history of the House bill indicates that property losses are not meant to be compensated by the Civil Liberties Act of 1987, but this should be specified in the legislation itself. "It is important to emphasize that this \$20,000 payment per person is not reimbursement for the loss of property or employment. Rather, it is in the nature of 'liquidated damages'—these individuals are being partially compensated for the violation of their civil rights." 133 CONG. REC. H7561 (daily ed. Sept. 17, 1987) (statement of Rep. Fish). "Under H.R. 442, the restitution is not for lost property and wages . . . but for the sweeping loss of individual rights." *Id.* at H7594 (statement of Rep. Mineta).

Similarly, for clarity, the bills should specify that an internee is entitled to compensation under the 1987 Act even though he has received compensation under the American-Japanese Evacuation Claims Act. See S. REP. NO. 202, 100th Cong., 1st Sess. 5 (1987).

309. Two purposes enumerated in House Bill 442, but not in Senate Bill 1009, are to: "(5) discourage the occurrence of similar injustices and violations of civil liberties in the future; and (6) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations." H.R. 442, 100th Cong., 1st Sess. § 2(5)-(6) (1987). If these two purposes are to be fulfilled, the bill should clearly state that the monetary reparation includes compensation for violations of constitutional rights.

310. H.R. 442, 100th Cong., 1st Sess. § 4 (1987). A similar provision provides for restitution of governmental positions, status or entitlements lost as a result of the evacuation, relocation and internment. *Id.* § 5. The bill directs United States departments and agencies to

for restitution of a "position, status, or entitlement lost in whole or in part because of . . . the evacuation, relocation, and internment" ³¹¹ A possible solution to this problem might be an appeal process to review the Attorney General's recommendations and departmental/agency decisions. The appeal could be to the courts or to another independent body. Another possibility would be to set up an independent tribunal to make recommendations to the Attorney General and federal departments/agencies. The Attorney General and federal departments/agencies could be required to defer to these recommendations.

b. other proposals ³¹²

Some less critical proposals include the following:

1. Amend the bills to specify that recovery is for the government's constitutional violations of the rights of those interned during World War II. ³¹³ This change would recognize the unconstitutionality of the government's acts in a more meaningful way than the presently proposed public apology.

2. Adopt the House Bill's provisions expressing two of the Act's purposes: to "discourage the occurrence of similar injustices and violations in the future," ³¹⁴ and to "make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations." ³¹⁵ This amendment would serve as a reminder to future generations of the grave errors that can be made during times of national crisis. ³¹⁶

liberally review applications made for restitution of positions, status or entitlements. *Id.* See also S. 1009, 100th Cong., 1st Sess. §§ 202-203 (1987).

311. H.R. 442, 100th Cong., 1st Sess. § 5(a) (1987). See also S. 1009, 100th Cong., 1st Sess. § 203(a) (1987).

312. Another criticism that has been made is that, as with any compensation system, the flat \$20,000 per internee reparation will overcompensate some while undercompensating others. An example of someone who might be overcompensated is an infant born in the relocation camps. If this infant suffered no adverse medical or emotional effects from the internment, then the \$20,000 payment would overcompensate him. An example of someone who might be undercompensated is someone who lost real property as a result of the internment. In most cases, the \$20,000 payment would not compensate for the loss of real property as well as losses of personal freedom, personal property, constitutional rights, education and job training. Furthermore, in 1945 dollars, the reparations payment is equivalent to only \$2,863. 133 CONG. REC. H7578 (daily ed. Sept. 17, 1987) (statement of Rep. Swindall).

313. Compare H.R. 442, 100th Cong., 1st Sess. § 2(1) (1987); S. 1009, 100th Cong., 1st Sess. § 1(a)(6) (1987).

314. H.R. 442, 100th Cong., 1st Sess. § 2(5) (1987).

315. *Id.* § 2(6).

316. That prejudice continues to affect governmental decisions may be seen in the following statements:

3. Adopt the Senate Bill's recommendation that eligible individuals be encouraged to file claims through a public awareness campaign.³¹⁷ The primary burden to locate eligible individuals should remain on the government. However, since many eligible individuals are now elderly, an awareness campaign would help ensure that eligible recipients receive their reparations in a timely manner. It would also be important to provide notification of eligibility in both Japanese and English.

4. Include heirs of internees in the definition of "eligible individuals."³¹⁸ This would ensure that these heirs would receive that which the decedent would have left to them but for the losses incurred due to the internment.

5. Adopt the Senate Bill's longer period for the extinguishment of claims against the United States. Presently, the Senate Bill provides for a ten year cut-off of all claims by internees against the United States.³¹⁹ The House Bill provides for only a six month cut-off.³²⁰

The adoption of the longer ten year period would be important because of pending and future litigation. This longer period is necessary to allow *Hohri* class members, and others who might want to file suit independently, time to decide whether to accept or reject payment.

6. The bills also provide for a board to "sponsor research and public educational activities, and to publish the hearings and findings of the Commission, so that events surrounding the evacuation, relocation, and internment . . . will be remembered . . ."³²¹ To ensure that the funds are used in the best interests of the Japanese American community, it would

I am appalled by the suggestion made by some Members of the House that one of the consequences of approval of this bill may be the rebirth of the discrimination against Japanese-Americans that gave rise to this wrong. To my mind that would be a reason for approving this bill, to show that this Congress believes . . . that there is no place for such vicious thinking in our country, that threats or warnings, that such attitudes will rise again if we pass this act cannot be accepted or endorsed.

133 CONG. REC. H7582 (daily ed. Sept. 17, 1987) (statement of Rep. Yates).

I was around in 1942, 1943, 1944, 1945, 1946, and 1947, and I heard that word. I did not like it then, and I do not like it now. The word I am talking about is the word, "Jap." I hear it in this country too much, and I hear it in conjunction with the trade bill.

133 CONG. REC. H7590 (daily ed. Sept. 17, 1987) (statement of Rep. Arme). "The current discrimination is motivated in part by fears among some Americans that Asians are 'taking over' businesses and jobs. The inability of certain U.S. industries to compete effectively against Asian—particularly Japanese—imports has been a factor." 133 CONG. REC. H7571 (daily ed. Sept. 17, 1987) (statement of Rep. Levine of California).

317. S. 1009, 100th Cong., 1st Sess. § 205(a)(1) (1987).

318. H.R. 442, 100th Cong., 1st Sess. § 10(2) (1987); S. 1009, 100th Cong., 1st Sess. § 201(1) (1987).

319. S. 1009, 100th Cong., 1st Sess. § 205(e) (1987).

320. H.R. 442, 100th Cong., 1st Sess. § 7(a)(3) (1987).

321. *Id.* § 8(b)(1). The Senate bill provides for disbursements from the fund for the "gen-

be important for some members of the board to be of Japanese ancestry.³²²

7. Provide funds for the preservation or reconstruction of at least one relocation center as a national memorial/museum. If the internment is to be remembered, surely the place where the internees were held should be preserved.

Related to this, a provision should be included so that any remaining funds at the board's sunset would be donated to help maintain this memorial/museum.³²³

Although these bills do not represent a perfect solution to the wrongs committed, they are a long overdue step toward compensating the internees. The next section will discuss how Congress can help deter similar internment-like actions from occurring in the future.

D. A Legislative Proposal to Prevent Future Denials of Constitutional Rights by the Federal Government

As discussed, it is necessary for Congress and/or the courts to provide redress to the internees for wrongs committed against them during World War II. But what of future violations of constitutional rights under similar circumstances? To protect against future violations, Congress should enact legislation to provide qualified immunity³²⁴ to the federal government in "internment type"³²⁵ circumstances. Congress could model legislation after the subjective standard for qualified immunity delineated in *Butz v. Economou*.³²⁶ This would help ensure that the government carefully weighs decisions that might be motivated by racial or

eral welfare of the ethnic Japanese community in the United States" S. 1009, 100th Cong., 1st Sess. § 206(b)(4) (1987).

322. S. 1009, 100th Cong., 1st Sess. § 206(c) (1987).

323. Presently, if all funds are not expended 10 years after enactment, the remainder will be deposited in the miscellaneous receipts account in the Treasury. H.R. 442, 100th Cong., 1st Sess. § 6(d) (1987); S. 1009, 100th Cong., 1st Sess. § 206(h) (1987). A provision allowing for remaining funds to be used to maintain a memorial would only be just. After more than 40 years, it is not appropriate to allow funds not expended to be returned to the federal government. Had Congress acted earlier, the monies would have been used to compensate internees that are now deceased.

324. See H.R. 595, 98th Cong., 1st Sess. (1983); S. 1775, 97th Cong., 1st Sess. (1981); H.R. 2659, 96th Cong., 1st Sess. (1979) (suggesting a remedy against the United States for constitutional torts and disallowing the federal government from asserting absolute or qualified immunity of an employee as a defense). Presently, the federal government has absolute immunity for violations of almost all constitutional rights. This Comment suggests qualified immunity for the federal government because of the more realistic possibility of enactment.

325. This proposal is limited to internment type situations in which government officials act out of prejudice, rather than out of concern for national security.

326. 438 U.S. 478 (1978).

other types of prejudice as opposed to a genuine concern for national security. Moreover, if it was found that the government was not entitled to absolute immunity, redress would be available to the citizen.

1. *Butz v. Economou*: The rationale for allowing qualified immunity

In *Butz*, the Court found that federal officials are not always entitled to absolute immunity.³²⁷ For example, if the executive officer knew or should have known that he was acting in a way which violated the Constitution or a clearly established constitutional rule, then he was entitled only to qualified immunity.³²⁸ The Court's rationale was that if "all officials were . . . exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs."³²⁹ The Court balanced the need to redress the wrong against the need to protect officials "required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."³³⁰ The Court then concluded that qualified immunity would address all concerns.³³¹ An official would not be liable for a mistake of judgment, fact or law,³³² and therefore would not be hindered from performing his duties. Yet, the citizen would be protected when an official knew or should have known his acts were unconstitutional.³³³

The rationale for allowing qualified immunity to officials is equally applicable to the federal government. Qualified immunity would both redress the wrong and protect the government from liability if the government acted appropriately.³³⁴ As recognized in *Butz*, "it is not unfair to hold liable the [federal government if it] knows or should know [it] is acting outside the law, and that insisting on an awareness of clearly es-

327. *Id.* at 507. In *Butz*, plaintiff brought a suit for damages against federal executive branch officials for violation of his constitutional rights. *Id.* at 480. Plaintiff alleged that Department of Agriculture officials had "instituted an investigation and an administrative proceeding against him in retaliation for his criticism of that agency." *Id.*

328. *Id.* at 507.

329. *Id.* at 505.

330. *Id.* at 506.

331. *See id.* at 506-07. *See also* *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703-05 (1949) (suggesting that action in damages be allowed against government where someone's constitutional rights have been violated, but not allowed if action is for declaratory or injunctive relief because that would hamper government in carrying out its functions). Hindering the government's functions would "outweigh[] the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event." *Id.* at 703-04.

332. *Butz*, 438 U.S. at 507.

333. *Id.* at 506-07.

334. *See infra* notes 344-47 and accompanying text for a discussion of the appropriate standard of review when the government asserts an affirmative defense of qualified immunity.

established constitutional limits will not [be an undue interference.]”³³⁵ Only qualified immunity should therefore be accorded the federal government for constitutional violations; to do otherwise would deny the citizen redress.

a. A return to the subjective standard for qualified immunity

- i. The *Harlow v. Fitzgerald* Court’s abandonment of the subjective standard—should an objective or subjective standard be used to determine the availability of a qualified immunity defense?

Prior to the Supreme Court’s decision in *Harlow v. Fitzgerald*,³³⁶ qualified immunity was not available if an official knew or reasonably should have known that his actions were unconstitutional (the objective standard) or if he intentionally deprived someone of constitutional rights (the subjective standard).³³⁷ However, in *Harlow*, the Supreme Court held the subjective standard could not be used to deny government officials qualified immunity.³³⁸ The Court reasoned that the subjective standard was incompatible with the Court’s desire to prevent “insubstantial claims” from proceeding to trial.³³⁹ The Court found that the issue of an official’s intent rarely could be decided on summary judgment.³⁴⁰ “Judicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons”³⁴¹ Thus, under the subjective standard, even insubstantial claims could not be dismissed prior to a trial examining an official’s motives.³⁴² The *Harlow* Court therefore preferred the objective standard because it allowed insubstantial claims to be decided on summary judgment.³⁴³

335. *Butz*, 438 U.S. at 506-07. See *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). The internment type situation is analogous to the situation in *Monell*. In *Monell*, the Supreme Court held that local governments are liable for infringement of constitutional rights when acting pursuant to local policy. *Id.* at 690. Similarly, the federal government should be liable for unconstitutional actions taken pursuant to congressional enactment or executive order.

336. 457 U.S. 800 (1982). In *Harlow v. Fitzgerald*, plaintiff brought an action for damages against senior White House aides and former President Richard Nixon for conspiracy to violate his constitutional and statutory rights. The violation was based on plaintiff’s alleged unlawful discharge from employment in the Department of the Air Force. *Id.* at 802-05.

337. *Id.* at 815, 817-18.

338. *Id.* at 817-18.

339. *Id.* at 815-16.

340. *Id.* at 816.

341. *Id.* at 817.

342. *Id.* at 816.

343. *Id.* at 815-18.

- ii. The subjective standard should be employed in any legislation providing qualified immunity

The objective standard should not be used to determine whether the government is entitled to qualified immunity. In internment type cases, the issue is not whether the government knew or should have known its acts were unconstitutional. For example, in *Hirabayashi v. United States*,³⁴⁴ the Supreme Court recognized that, under normal circumstances, distinctions based on race were denials of equal protection.³⁴⁵ The government therefore constructively knew its racially based curfew and exclusion orders deprived individuals of constitutional rights. The racially based curfew and exclusion orders were upheld, however, on the grounds of "military necessity."³⁴⁶ In internment type situations, then, the question is not whether the government knew it was acting unconstitutionally, but whether its actions were justified under the circumstances. If the government's actions were justified by military necessity or national security, and the government acted in good faith, the government's qualified immunity would protect it from liability. But, if the government's acts were not required by military necessity or for national security, then the government's liability would depend on intent. Qualified immunity would not be available as a defense if it was shown that the government had acted in bad faith.³⁴⁷ For the very limited purpose of internment type cases, an inquiry into subjective intent is mandated. An objective inquiry into whether the government knew or reasonably could have known its acts were unconstitutional is moot. Since subjective intent is the only useful standard under these circumstances, Congress should use that standard when drafting legislation which accords the government qualified immunity.

V. CONCLUSION

A. *The Role of the Supreme Court and Congress*

The time has come for the Supreme Court to provide common law on the matter of the government's sovereign immunity for violations of the internees' constitutional rights. As Chief Judge Markey stated, "[t]he wrongs . . . done to Americans of Japanese ancestry under Execu-

344. 320 U.S. 81, 100 (1943).

345. *Id.* at 100.

346. See *supra* notes 137-47 and accompanying text.

347. Of course, the statute of limitations would need to be long enough to allow evidence of bad faith to be discovered. A court might use an equitable tolling theory to toll the statute of limitations when the government disguises its bad faith. See *supra* notes 183-88 and accompanying text.

tive Order 9066 is disputed by no one involved in [the *Hohri v. United States*] case."³⁴⁸ The Court's role may be to provide a means to involve Congress in "the continuing process of defining the content and consequences of individual liberties."³⁴⁹ Thus, where Congress has refused or failed to act, the Court should provide constitutional common law which, if considered too far-reaching, Congress could modify or reject.³⁵⁰ Therefore, if the *Hohri* case comes before the Supreme Court again, the Court should allow plaintiffs to pursue their causes of action.³⁵¹ This would pressure Congress to pass reparations legislation.³⁵² The Supreme Court's decision, then, would serve as an incentive for Congress to act on a matter that has gone unattended for decades. The Supreme Court's decision might also serve as an incentive for Congress to enact legislation providing qualified immunity to the federal government in internment type situations. Such legislation would allow redress for unconstitutional actions, yet prevent the government from being held liable if it acts in good faith.

Some would prefer to forget the internment ever occurred. They believe it could never happen again. But until racial and other prejudices are eradicated, it is all too possible that an internment type situation could once again develop. It is therefore essential that this Country recognize its mistake in a meaningful way—by providing reparations to those interned and enacting legislation allowing a cause of action against the federal government for constitutional violations which might occur in the future.

*Barbara L. Tang**

348. *Hohri v. United States*, 782 F.2d 227, 256 (D.C. Cir.) (Markey, Chief Judge, dissenting), *reh'g en banc denied per curiam*, 793 F.2d 304 (D.C. Cir. 1986), *vacated and remanded*, 107 S. Ct. 2246 (1987) (with instructions to transfer case to the Federal Circuit); see President Ford's repeal of Executive Order 9066 where he stated that Executive Order 9066 was a mistake. Proclamation No. 4417, 3 C.F.R. 8 (1977); see also *Hohri*, 782 F.2d at 253 n.67.

349. Monaghan, *The Supreme Court 1974 Term, Foreward: Constitutional Common Law*, 89 HARV. L. REV. 25, 27 (1975).

350. *Id.* at 29.

351. *Hohri*, 586 F. Supp. at 772-73.

352. As previously discussed, the 100th Congress recently passed reparations legislation. See *supra* notes 290-99 and accompanying text. Should the President veto this legislation, Congress would have to override the President's veto by a two-thirds vote for it to become law.

* The author wishes to thank Professor Christopher N. May of Loyola Law School for his guidance and insight throughout the preparation of this Comment and Raymond Tang for his patience and understanding.

APPENDIX I

H.R. 442

AN ACT

To implement recommendations of the Commission on Wartime
Relocation and Internment of Civilians

*Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Liberties Act of 1987".

SEC. 2. PURPOSES.

The purposes of this Act are to—

- (1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;
- (2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens;
- (3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event;
- (4) make restitution to those individuals of Japanese ancestry who were interned;
- (5) discourage the occurrence of similar injustices and violations of civil liberties in the future; and
- (6) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.

SEC. 3. STATEMENT OF THE CONGRESS.

The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons, and were motivated in part by racial prejudice, wartime hysteria, and a failure of political leadership. The ex-

cluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.

SEC. 4. REMEDIES WITH RESPECT TO CRIMINAL CONVICTIONS.

(a) **REVIEW OF CONVICTIONS.**—The Attorney General is requested to review any case in which an individual living on the date of the enactment of this Act who, while a United States citizen or permanent resident alien of Japanese ancestry, was convicted of a violation of—

(1) Executive Order Numbered 9066, dated February 19, 1942;

(2) the Act entitled “An Act to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones”, approved March 21, 1942 (56 Stat. 173); or

(3) any other Executive order, Presidential proclamation, law of the United States, directive of the Armed Forces of the United States, or other action made by or on behalf of the United States or its agents, representatives, officers, or employees respecting the exclusion, relocation, or detention of individuals solely on the basis of Japanese ancestry; on account of the refusal by such individual, during the evacuation, relocation, and internment period, to accept treatment which discriminated against the individual on the basis of the individual’s Japanese ancestry.

(b) **RECOMMENDATIONS FOR PARDONS.**—Based upon any review under subsection (a), the Attorney General is requested to recommend to the President for pardon consideration those convictions which the Attorney General considers appropriate.

(c) **ACTION BY THE PRESIDENT.**—In consideration of the statement of the Congress set forth in section 3, the President is requested to offer pardons to any individuals recommended by the Attorney General under subsection (b).

SEC. 5. CONSIDERATION OF COMMISSION FINDINGS BY DEPARTMENTS AND AGENCIES.

(a) **REVIEW OF APPLICATIONS BY ELIGIBLE INDIVIDUALS.**—

Each department and agency of the United States Government shall review with liberality, giving full consideration to the statement of the Congress set forth in section 3, any application by an eligible individual for the restitution of any position, status, or entitlement lost in whole or in part because of any discriminatory act of the United States Government against such individual which was based upon the individual's Japanese ancestry and which occurred during the evacuation, relocation, and internment period.

(b) **NO NEW AUTHORITY CREATED.**—Subsection (a) does not create new authority to grant restitution described in that subsection, or establish new eligibility to apply for such restitution.

SEC. 6. TRUST FUND.

(a) **ESTABLISHMENT.**—There is hereby established in the Treasury of the United States the Civil Liberties Public Education Fund, to be administered by the Secretary of the Treasury.

(b) **RESPONSIBILITIES OF THE SECRETARY OF THE TREASURY.**—

(1) **INVESTMENT.**—The Secretary of the Treasury shall invest such portion of the Fund as is not, in the judgment of the Secretary, required to meet current withdrawals. Such investments may be made only in interest-bearing obligations of the United States. For such purpose, such obligations may be acquired—

(A) on original issue at the issue price; or

(B) by purchase of outstanding obligations at the market price.

(2) **SALE OF OBLIGATIONS.**—Any obligation acquired by the Fund may be sold by the Secretary of the Treasury at the market price.

(3) **CREDITS TO FUND.**—The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to and form a part of the Fund.

(c) **USES OF THE FUND.**—Amounts in the Fund shall be available only for disbursement by the Attorney General under section 7 and by the Board under section 8.

(d) **TERMINATION.**—The Fund shall terminate not later than the earlier of the date on which an amount has been expended from the Fund which is equal to the amount authorized to be appropriated to the Fund by subsection (e), and any income earned on such amount, or 10 years after the date of enactment of this Act. If all of the amounts in the Fund have not been expended by the end of that 10-year period, investments of amounts in the Fund shall be liquidated and receipts thereof deposited in

the Fund and all funds remaining in the Fund shall be deposited in the miscellaneous receipts account in the Treasury.

(e) **AUTHORIZATION OF APPROPRIATIONS.**—There is authorized to be appropriated to the Fund \$1,250,000,000. Any amounts appropriated pursuant to this section are authorized to remain available until expended, except that any funds appropriated for payments by the Attorney General under section 7 shall be used for such payments during the fiscal year in which the funds are first made available.

SEC. 7. RESTITUTION.

(a) **LOCATION AND PAYMENT OF ELIGIBLE INDIVIDUALS.**—

(1) **IN GENERAL.**—Subject to paragraph (4), the Attorney General shall pay out of the Fund to each eligible individual the sum of \$20,000, unless such individual refuses to accept the payment. The Attorney General shall, within 9 months after the date of the enactment of this Act, identify and locate, without requiring any application for payment and using records already in the possession of the United States Government, each eligible individual. Failure to be identified and located within such 9-month period shall not preclude an eligible individual from receiving payment under this section. Any eligible individual may notify the Attorney General that such individual is an eligible individual, and may provide documentation therefor. The Attorney General shall designate an officer or employee to whom such notification and documentation may be sent. The Attorney General shall, when funds are made available for payments to an eligible individual under this section, notify that eligible individual of his or her eligibility for payment under this section.

(2) **EFFECT OF REFUSAL TO ACCEPT PAYMENT.**—If an eligible individual refuses to accept any payment under this section, the amount of such payment shall remain in the Fund, and no payment may be made under this section to such individual at any time after such refusal.

(3) **PAYMENT IN FULL SETTLEMENT OF CLAIMS AGAINST THE UNITED STATES.**—The payment to an eligible individual under this section shall be in full satisfaction of any claim of such individual against the United States arising out of acts done to that individual that are described in section 10(2)(B). This paragraph shall apply to any eligible individual who does not refuse to accept payment under this section within 6 months after receiving the notification from the Attorney General referred to in the last sentence of paragraph (1).

(4) **EXCLUSION OF CERTAIN INDIVIDUALS.**—No payment

may be made under this section to any individual who, after September 1, 1987, is awarded a final judgment or a settlement on a claim of such individual against the United States for acts done to that individual that are described in section (10)(2)(B).

(b) **ORDER OF PAYMENTS.**—The Attorney General shall endeavor to make payments under this section to eligible individuals in the order of date of birth (with the oldest receiving full payment first), until all eligible individuals have received payment in full.

(c) **RESOURCES FOR LOCATING ELIGIBLE INDIVIDUALS.**—In attempting to locate any eligible individual, the Attorney General may use any facility or resource of any public or nonprofit organization or any other record, document, or information that may be made available to the Attorney General.

(d) **NOTIFICATION AND DOCUMENTATION BY ELIGIBLE INDIVIDUALS.**—Any eligible individual who, by September 30, 1989, has not received payment under this section from the Attorney General or has not otherwise been notified by the Attorney General for purposes of payment under this section, may notify the Attorney General that such individual is an eligible individual and may provide documentation therefor. The Attorney General shall designate an officer or employee to whom such notification and documentation may be sent.

(e) **ADMINISTRATIVE COSTS NOT PAID FROM THE FUND.**—No costs incurred by the Attorney General in carrying out this section shall be paid from the Fund or set off against, or otherwise deducted from, any payment under this section to any eligible individual.

(f) **TERMINATION OF DUTIES OF ATTORNEY GENERAL.**—The duties of the Attorney General under this section shall cease with the termination of the Fund.

(g) **CLARIFICATION OF TREATMENT OF PAYMENTS UNDER OTHER LAWS.**—Amounts paid to an eligible individual under this section—

(1) shall be treated for purposes of the internal revenue laws of the United States as damages for human suffering; and

(2) shall not be included as income or resources for purposes of determining eligibility to receive benefits described in section 3803(c)(2)(C) of title 31, United States Code, or the amount of such benefits.

SEC. 8. BOARD OF DIRECTORS OF THE FUND.

(a) **ESTABLISHMENT.**—There is hereby established the Civil Liber-

ties Public Education Fund Board of Directors which shall be responsible for making disbursements from the Fund in the manner provided in this section.

(b) **USES OF FUND.**—The Board may make disbursements from the Fund only—

(1) to sponsor research and public education activities, and to publish the hearings and findings of the Commission, so that the events surrounding the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry will be remembered, and so that the causes and circumstances of this and similar events may be illuminated and understood; and

(2) for reasonable administrative expenses of the Board, including expenses incurred under subsections (c)(3), (d), and (e).

(c) **MEMBERSHIP.**—

(1) **APPOINTMENT.**—The Board shall be composed of 9 members appointed by the President, by and with the advice and consent of the Senate, from individuals who are not officers or employees of the United States Government.

(2) **TERMS.**—(A) Except as provided in subparagraphs (B) and (C), members shall be appointed for terms of 3 years.

(B) Of the members first appointed—

(i) 5 shall be appointed for terms of 3 years; and

(ii) 4 shall be appointed for terms of 2 years; as designated by the President at the time of appointment.

(C) Any member appointed to fill a vacancy occurring before the expiration of the term for which such member's predecessor was appointed shall be appointed only for the remainder of such term. A member may serve after the expiration of such member's term until such member's successor has taken office. No individual may be appointed to more than 2 consecutive terms.

(3) **COMPENSATION.**—Members of the Board shall serve without pay, except that members of the Board shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out the functions of the Board, in the same manner as persons employed intermittently in the United States Government are allowed expenses under section 5703 of title 5, United States Code.

(4) **QUORUM.**—5 members of the Board shall constitute a quorum but a lesser number may hold hearings.

(5) **CHAIR.**—The Chair of the Board shall be elected by the members of the Board.

(d) **DIRECTOR AND STAFF PERSONNEL.**—

(1) **DIRECTOR.**—The Board shall have a Director who shall be appointed by the Board.

(2) **ADDITIONAL STAFF.**—The Board may appoint and fix the pay of such additional staff as it may require.

(3) **APPLICABILITY OF CIVIL SERVICE LAWS.**—The Director and the additional staff of the Board may be appointed without regard to section 5311(b) of title 5, United States Code, and without regard to the provisions of such title governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that the compensation of any employee of the Board may not exceed a rate equivalent to the minimum rate of basic pay payable for GS-18 of the General Schedule under section 5332(a) of such title.

(e) **ADMINISTRATIVE SUPPORT SERVICES.**—The Administrator of General Services is authorized to provide to the Board on a reimbursable basis such administrative support services as the Board may reasonably request.

(f) **GIFTS AND DONATIONS.**—The Board may accept, use, and dispose of gifts or donations of services or property for purposes authorized under subsection (b).

(g) **ANNUAL REPORTS.**—Not later than 12 months after the first meeting of the Board and every 12 months thereafter, the Board shall transmit to the President and to each House of the Congress a report describing the activities of the Board.

(h) **TERMINATION.**—90 days after the termination of the Fund, the Board shall terminate and all obligations of the Board under this section shall cease.

SEC. 9. DOCUMENTS RELATING TO THE INTERNMENT.

(a) **DEPOSIT OF DOCUMENTS IN NATIONAL ARCHIVES.**—All documents, personal testimony, and other material collected by the Commission during its inquiry shall be delivered by the custodian of such material to the Archivist of the United States who shall deposit such material in the National Archives of the United States. The Archivist shall make such material available to the public for research purposes.

(b)(1) **PUBLIC AVAILABILITY OF CERTAIN RECORDS OF THE HOUSE OF REPRESENTATIVES.**—The Clerk of the House of Representatives is authorized to permit the Archivist of the United States to make

available for use records of the House not classified for national security purposes, which have been in existence for not less than thirty years, relating to the evacuation, relocation, and internment of individuals during the evacuation, relocation, and internment period.

(2) This subsection is enacted as an exercise of the rulemaking power of the House of Representatives, but is applicable only with respect to the availability of records to which it applies, and supersedes other rules only to the extent that the time limitation established by this section with respect to such records is specifically inconsistent with such rules, and is enacted with full recognition of the constitutional right of the House to change its rules at any time, in the same manner and to the same extent as in the case of any other rule of the House.

SEC. 10. DEFINITIONS.

For the purposes of this Act—

(1) the term “evacuation, relocation, and internment period” means that period beginning on December 7, 1941, and ending on June 30, 1946;

(2) the term “eligible individual” means any individual of Japanese ancestry who is living on the date of the enactment of this Act and who, during the evacuation, relocation, and internment period—

(A) was a United States citizen or a permanent resident alien; and

(B) was confined, held in custody, relocated, or otherwise deprived of liberty or property as a result of—

(i) Executive Order Numbered 9066, dated February 19, 1942;

(ii) the Act entitled “An Act to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones”, approved March 21, 1942 (56 Stat. 173); or

(iii) any other Executive order, Presidential proclamation, law of the United States, directive of the Armed Forces of the United States or other action made by or on behalf of the United States or its agents, representatives, officers, or employees respecting the exclusion, relocation, or detention of individuals solely on the basis of Japanese ancestry; except that the term “eligible individual” does not include any individual who, during the period beginning on December 7, 1941, and ending on September 2, 1945, relocated to a country while the United States was at war with that country;

(3) the term “permanent resident alien” means an alien lawfully admitted into the United States for permanent residence;

(4) the term “Fund” means the Civil Liberties Public Education Fund established in section 6;

(5) the term “Board” means the Civil Liberties Public Education Fund Board of Directors established in section 8; and

(6) the term “Commission” means the Commission on Wartime Relocation and Internment of Civilians, established by the Commission on Wartime Relocation and Internment of Civilians Act.

SEC. 11. COMPLIANCE WITH BUDGET ACT.

No authority under this Act to enter into contracts or to make payments shall be effective except to the extent or in such amounts as are provided in advance in appropriations Acts. Any provision of this Act which, directly or indirectly, authorizes the enactment of new budget authority shall be effective only for fiscal year 1989 and thereafter.

Passed the House of Representatives September 17, 1987.

Attest: DONALD K. ANDERSON,
Clerk

APPENDIX II

S. 1009

A BILL

TO ACCEPT THE FINDINGS AND TO IMPLEMENT THE
RECOMMENDATIONS OF THE COMMISSION ON
WARTIME RELOCATION AND
INTERMENT OF CIVILIANS.

*Be it enacted by the Senate and House of Representatives of the
United States of America in Congress Assembled,*

FINDINGS AND PURPOSE

SECTION 1. (a) FINDINGS.—*The Congress finds that—*

(1) *the findings of the Commission on Wartime Relocation and Internment of Civilians, established by the Commission on Wartime Relocation and Internment of Civilians Act, accurately and completely describe the circumstances of the exclusion, relocation, and internment of in excess of one hundred and ten thousand United States citizens and permanent resident aliens of Japanese ancestry . . . ;*

(2) *the internment of individuals of Japanese ancestry was carried out without any documented acts of espionage or sabotage, or other acts of disloyalty by any citizens or permanent resident aliens of Japanese ancestry on the west coast;*

(3) *there was no military or security reason for the internment;*

(4) *the internment of the individuals of Japanese ancestry was caused by racial prejudice, war hysteria, and a failure of political leadership;*

(5) *the excluded individuals of Japanese ancestry suffered enormous damages and losses, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering;*

(6) *the basic civil liberties and constitutional rights of those individuals of Japanese ancestry interned were fundamentally violated by that evacuation and internment;*

. . .

(b) PURPOSES.—*The purposes of this Act are to—*

(1) *acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry;*

(2) *apologize on behalf of the people of the United States for*

the evacuation, relocation, and internment of the citizens and permanent resident aliens of Japanese ancestry;

(3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the reoccurrence of any similar event;

(4) make restitution to those individuals of Japanese ancestry who were interned;

...

TITLE I—RECOGNITION OF INJUSTICE AND APOLOGY ON BEHALF OF THE NATION

SEC. 101. The Congress accepts the findings of the Commission on Wartime Relocation and Internment of Civilians and recognizes that a grave injustice was done to both citizens and resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. On behalf of the Nation, the Congress apologizes.

TITLE II—UNITED STATES CITIZENS OF JAPANESE ANCESTRY AND RESIDENT JAPANESE ALIENS

DEFINITIONS

SEC. 201. For the purposes of this title—

(1) the term “eligible individual” means any living individual of Japanese ancestry who—

(A) is a United States citizen or permanent resident alien on the date of enactment of this Act; and

(B)(i) was enrolled on the records of the United States Government during the period beginning on December 7, 1941, and ending on June 30, 1946, as being in a prohibited military zone; or

(ii) was confined, held in custody, or otherwise deprived of liberty or property during the period as a result of—

(I) Executive Order Numbered 9066 (February 19, 1942; 7 Fed. Reg. 1407);

(II) the Act entitled “An Act to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones” and approved March 21, 1942 (56 Stat. 173); or

(III) any other Executive order, Presidential proclamation, law of the United States, directive of the Armed Forces of the United States, or other action made by or on behalf of the United States or

its agents, representatives, officers, or employees respecting the exclusion, relocation, or detention of individuals on the basis of race;

(2) *the term "Fund" means the Civil Liberties Public Education Fund established in section 204;*

(3) *the term "Board" means the Civil Liberties Public Education Fund Board of Directors established in section 206;*

(4) *the term "evacuation, relocation, and internment period" means that period beginning on December 7, 1941, and ending on June 30, 1946; and*

(5) *the term "Commission" means the Commission on War-time Relocation and Internment of Civilians, established by the Commission on Wartime Relocation and Internment of Civilians Act.*

CRIMINAL CONVICTIONS

SEC. 202. (a) REVIEW.—The Attorney General is requested to review any case in which a United States citizen or permanent resident alien of Japanese ancestry living on the date of the enactment of this Act was convicted of a violation of the laws of the United States, including convictions for violations of military orders, where such a conviction resulted from charges filed against such individuals during the evacuation, relocation, and internment period.

(b) *RECOMMENDATIONS.—Based upon the review required by subsection (a), the Attorney General is requested to recommend to the President for pardon consideration those convictions which the Attorney General finds were based on a refusal by such individuals to accept treatment that discriminated against them on the basis of race or ethnicity.*

(c) *PARDONS.—In consideration of the findings contained in this Act, the President is requested to offer pardons to those individuals recommended by the Attorney General pursuant to subsection (b).*

CONSIDERATION OF COMMISSION FINDINGS

SEC. 203. (a) FEDERAL CONSIDERATION AND REVIEW.—Departments and agencies of the United States Government to which eligible individuals may apply for the restitution of positions, status, or entitlements lost in whole or in part because of discriminatory acts of the United States Government against such individuals based upon their race or ethnicity and which occurred during the evacuation, relocation, and internment period shall review such applications for restitution of positions, status, or entitlements with liberality, giving full consideration to the historical findings of the Commission and the findings contained in this Act.

(b) *NO NEW AUTHORITY CREATED.*—Subsection (a) shall not be construed to create new authority to grant restitution described in that subsection, or establish new eligibility to apply for such restitution.

TRUST FUND

SEC. 204. (a) *ESTABLISHMENT.*—There is hereby established in the Treasury of the United States the Civil Liberties Public Education Fund, to be administered by the Secretary of the Treasury. Amounts in the Fund shall be invested in accordance with section 9702 of title 31, United States Code, and shall only be available for disbursement by the Attorney General under section 205, and by the Board of Directors of the Fund under section 206.

(b) *AUTHORIZATION.*—There are authorized to be appropriated to the Fund \$500,000,000 in fiscal 1989, \$400,000,000 in fiscal 1990, \$200,000,000 in fiscal 1991, \$100,000,000 in fiscal 1992 and \$100,000,000 in fiscal 1993.

RESTITUTION

SEC. 205. (a) *LOCATION AND PAYMENT OF ELIGIBLE INDIVIDUALS.*—

(1) The Attorney General, with the assistance of the Board, shall locate, using records already in the possession of the United States Government, each eligible individual and shall pay out of the Fund to each such individual the sum of \$20,000. The Attorney General shall encourage each eligible individual to submit his or her current address to the Department of Justice through a public awareness campaign.

(2) If an eligible individual refuses to accept any payment under this section, such amount shall remain in the Fund and no payment shall be made under this section to such individual at any future date.

(b) *PREFERENCE TO OLDEST.*—The Attorney General shall endeavor to make payment to eligible individuals who are living in the order of date of birth (with the oldest receiving full payment first), until all eligible individuals who are living have received payment in full.

(c) *NONRESIDENTS.*—In attempting to locate any eligible individual who resides outside the United States, the Attorney General may use any available facility or resources of any public or nonprofit organization.

(d) *NO SET OFF FOR ADMINISTRATIVE COSTS.*—No costs incurred by the Attorney General in carrying out this section shall be paid from the Fund or set off against, or otherwise deducted from, any payment under this section to any eligible individual.

(e) *EXTINGUISHMENT OF CLAIMS.*—*The claims of an eligible individual against the United States shall be extinguished—*

(A) *on a date which is ten years after the date of enactment of this Act; or*

(B) *on the date by which the individual has received the total amount of payments under this Act, whichever date first occurs.*

(f) *CLARIFICATION OF TREATMENT OF PAYMENTS UNDER OTHER LAWS.*—*Amounts paid to an eligible individual under this section—*

(1) *shall be treated for purposes of the Internal Revenue laws of the United States as damages for human suffering; and*

(2) *shall not be included as income or resources for purposes of determining eligibility to receive benefits described in section 3803(c)(2)(C) of title 31, United States Code, or the amount of such benefits.*

BOARD OF DIRECTORS

SEC. 206. (a) *ESTABLISHMENT.*—*There is hereby established the Civil Liberties Public Education Fund Board of Directors which shall be responsible for making disbursements from the Fund in the manner provided in this section.*

(b) *DISBURSEMENTS FROM FUNDS.*—*The Board of Directors may make disbursements from the Fund only—*

(1) *to sponsor research and public educational activities so that the events surrounding the relocation and internment of United States citizens and permanent resident aliens of Japanese ancestry will be remembered, and so that the cases and circumstances of this and similar events may be illuminated and understood;*

(2) *to fund comparative studies of similar civil liberties abuses, or to fund comparative studies of the effect upon particular groups of racial prejudice embodied by Government action in times of national stress;*

(3) *to prepare and distribute the hearings and findings of the Commission to textbook publishers, educators, and libraries;*

(4) *for the general welfare of the ethnic Japanese community in the United States, taking into consideration the effect of the exclusion and detention on the descendants of those individuals who were detained during the evacuation, relocation, and internment period (individual payments in compensation for loss or damages shall not be made under this paragraph); and*

(5) *for reasonable administrative expenses, including expenses incurred under subsections (c)(3), (d), and (e).*

(c) *MEMBERSHIP AND TERMS OF OFFICE.*—(1) *The Board shall be*

composed of nine members appointed by the President, by and with the advice and consent of the Senate, from persons who are not officers or employees of the United States Government. At least five of the individuals appointed shall be individuals who are of Japanese ancestry.

(2)(A) Except as provided in subparagraphs (B) and (C), members shall be appointed for terms of 3 years.

(B) Of the members first appointed—

(i) five shall be appointed for terms of 3 years; and

(ii) four shall be appointed for terms of 2 years; as designated by the President at the time of appointment.

(C) Any member appointed to fill a vacancy occurring before the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A member may serve after the expiration of his term until his successor has taken office. No individual may be appointed to more than two consecutive terms.

(3) Members of the Board shall serve without pay, except members of the Board shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out the functions of the Board, in the same manner as persons employed intermittently in the United States Government are allowed expenses under section 5703 of title 5, United States Code.

(4) Five members of the Board shall constitute a quorum but a lesser number may hold hearings.

(5) The Chair of the Board shall be elected by the members of the Board.

(d)(1) The Board shall have a Director who shall be appointed by the Board and who shall be paid at a rate not to exceed the minimum rate of basic pay payable for GS-18 of the General Schedule under section 5332(a) of title 5, United States Code.

(2) The Board may appoint and fix the pay of such additional staff personnel as it may require.

(3) The Director and the additional staff personnel of the Board may be appointed without regard to section 5311(B) of title 5, United States Code, and may be appointed without regard to the provisions of such title governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that the compensation of any employee of the Board may not exceed a rate equivalent to the rate payable under GS-18 of the General Schedule under section 5332(a) of such title.

(e) *SUPPORT SERVICES.*—*The Administrator of General Services shall provide to the Board of Directors on a reimbursable basis such administrative support services as the Board may request.*

(f) *DONATIONS.*—*The Board may accept, use, and dispose of gifts or donations or services or property for purposes authorized under subsection (b).*

(g) *ANNUAL REPORT.*—*Not later than twelve months after the first meeting of the Board and every twelve months thereafter, the Board shall transmit a report describing the activities of the Board to the President and to each House of the Congress.*

(h) *SUNSET FOR BOARD.*—*The Board shall terminate not later than the earlier of ninety days after the date on which an amount has been obligated to be expended from the Fund which is equal to the amount authorized to be appropriated to the Fund or ten years after the date of enactment of this title. Investments shall be liquidated and receipts thereof deposited in the Fund and all funds remaining in the Fund shall be deposited in the miscellaneous receipts account in the Treasury of the United States.*

COMPLIANCE WITH BUDGET ACT

SEC. 207. No authority under this title to enter into contracts or to make payments shall be effective except to the extent or in such amounts as are provided in advance in appropriations Acts. Any provision of this title which, directly or indirectly, authorizes the enactment of new budget authority shall be effective only for fiscal year 1989 and thereafter.